



3 1761 11636971 1



Digitized by the Internet Archive
in 2023 with funding from
University of Toronto

<https://archive.org/details/31761116369711>

CAI MI 81
I 51

3

IMMIGRATION APPEAL CASES

AFFAIRES D'IMMIGRATION EN APPEL

Selected Judgments - Recueil de jugements

I

(1967-1969) 1 I.A.C.

(1967-1969) 1 A.I.A.

Président

Janet V. Scott

Chairman

Vice-président

J.C.A. Campbell

Vice-Chairman

Vice-président

J.-Paul Geoffroy

Vice-Chairman

Resigned April 18, 1969

a démissionné le 18 avril 1969.

Jean-Pierre Houle

A.B. Weselak

J. Byrne

U. Benedetti

G. Légaré

F. Glogowski

Le Régistraire

Roger Hélie

Registrar

CASES REPORTED OR SUMMARIZED
CAUSES RAPPORTÉES OU RÉSUMÉES

| | <u>PAGES</u> |
|---|--------------|
| TURPIN v. Min. M. & I. | 1 |
| PETERSEN v. Min. M. & I. | 21 |
| QUARCINI v. Min. M. & I. | 32 |
| GIOULEKAS v. Min. M. & I. | 36 |
| AINA v. Min. M. & I. | 46 |
| CHAN, et al. v. Min. M. & I. | 55 |
| TSANTILLI (ILLIOPOULOS) v. Min. M. & I. | 63 |
| MAROUDAS v. Min. M. & I. | 76 |
| PATRINOS v. Min. M. & I. | 90 |
| CHLOROS, et al. v. Min. M. & I. | 97 |
| PRASAD v. Min. M. & I. | 102 |
| CAUDILL v. Min. M. & I. | 108 |
| RAKIF v. Min. M. & I. | 116 |
| GRILLO v. Min. M. & I. | 119 |
| MAYOUTE v. Min. M. & I. | 121 |
| MOSHOS and family v. Min. M. & I. | 125 |
| BELT-Y-DE CARDENAS v. Min. M. & I. | 134 |
| FOLINO (and son) v. Min. M. & I. | 144 |
| MARTIN v. Min. M. & I. | 152 |
| FOULGER v. Min. M. & I. | 153 |
| MOORE v. Min. M. & I. | 154 |
| TONNER v. Min. M. & I. | 156 |

| | |
|--|-----|
| PILLE v. Min. M. & I. | 157 |
| GOLDENBER and his wife v. Min. M. & I. | 158 |
| SELINIOTAKIS (PLAKAS) v. Min. M. & I. | 159 |
| FOUCHÉ v. Min. M. & I. | 160 |
| WITTKAMPER v. Min. M. & I. | 161 |
| MORLEY v. Min. M. & I. | 162 |
| DOUCE v. Min. M. & I. | 162 |

Erskin Maximillian TURPIN, appellant and

The Minister of Manpower and Immigration, Respondent

Decision: February 12, 1968

(File: 67-5006)

Coram: J.V. Scott, Chairman, J.-Paul Geoffroy, G.Legaré

S. 23 Report - Applicability to person in Canada - "Seeking to come into"
- Defined - Immigration Act, S. 23.-

Inquiry - S.I.O. having access to irrelevant or prejudicial evidence -
Canadian Bill of Rights, S.C. 1960, C. 44.

Inquiry - compellability of subject as witness - Canada Evidence Act
R.S.C. 1952 C. 307 S.4; 5.

Moral turpitude - Defined - "Crime involving moral turpitude - interpreted -
Immigration Act S. 5(d).

Rapport selon l'article 23 - Application à une personne au Canada - "Cherchant
à entrer au Canada"- Définition - Loi sur l'immigration: Act. 23

Enquête. - Accès par l'enquêteur spécial à une preuve non pertinente ou pré-
judiciable - La Déclaration Canadienne des Droits. S.C. 1960, Chap. 44 -

Enquête - Sujet, témoin contraignable - Loi de la preuve au Canada S.R.C. 1952;
Chap. 307, Art. 4;5 -

Turpitude morale - Définition - Crime comprenant turpitude morale - Interpréta-
tion - Loi sur l'immigration: Art. 5 (d).-

Held:- The phrase "seeking to come into Canada" as used in Section 23, Immigration Act, includes the meaning of "seeking admission" and a Section 23 Report was properly used even though the appellant was physically in Canada at the time it was made. Under the Immigration Act a Special Inquiry Officer can properly conduct the Inquiry and make the decision thereon. The fact that he may have access to irrelevant or prejudicial evidence does not automatically invalidate the deportation order. The facts of each case must be examined to see whether this amounts to a denial of natural justice, contrary to the Canadian Bill of Rights. The subject of an inquiry is a compellable witness under the Immigration Act but is entitled to the protection of Section 5 of the Canada Evidence Act. Section 4 of the Canada Evidence Act does not apply. A Special Inquiry Officer, unless he had good reason to refuse, should always summons a witness when requested to do so by the subject of an Inquiry even though his power to do so is discretionary. The phrase "crime involving moral turpitude" must be interpreted generically and not specifically. The Board cannot go behind a conviction to ascertain the circumstances of the crime in question. If the crime generically involves inherently and necessarily moral turpitude, it falls within the Act. Moral turpitude implies vileness, depravity, baseness, dishonesty or immorality, and mens rea is consequently a necessary ingredient. In the crime of fraud as defined by the Criminal Code, the state of mind of the accused is a necessary ingredient for conviction. Fraud also necessarily and inherently involves dishonesty, and is consequently a crime involving moral turpitude. - Appeal dismissed.-

Arrêt:- L'expression "qui cherche à entrer au Canada" telle qu'employée à l'article 23 comprend la signification de "cherchant à être admis" et le rapport fait selon l'article 23 était dans l'ordre même si l'appelant était physiquement au Canada lorsque le rapport fut fait. D'après la Loi sur l'immigration, un enquêteur spécial peut conduire l'enquête et prendre la décision pertinente. Le fait qu'il peut avoir accès à une preuve non pertinente ou préjudiciable n'invalide pas nécessairement l'ordonnance d'expulsion; les faits de chaque cas doivent être examinés pour voir s'il s'agit d'un déni de justice naturelle, contraire à la Déclaration canadienne des droits de l'homme. Le sujet d'une enquête peut être un témoin contraignable selon la Loi sur l'Immigration mais il a droit à la protection mentionnée à l'article 5 de la Loi de la preuve au Canada. L'article 4 de la Loi de la preuve au Canada ne s'applique pas. Un enquêteur spécial, à moins qu'il ait une bonne raison pour refuser, doit toujours citer un témoin à comparaître, lorsque le sujet de l'enquête le requiert, lors même que son pouvoir de citer soit discrétionnaire. L'expression "crime impliquant turpitude morale" doit être interprétée d'une manière générique et non pas spécifique. La Commission ne doit pas chercher à connaître les antécédents d'une condamnation. Si le crime commis comporte la turpitude morale, d'une manière certaine et inhérente, il tombe sous la Loi. La turpitude morale comprend la bassesse, la dépravité, la lâcheté, la malhonnêteté ou l'immoralité et la mens rea est, par conséquent, un élément nécessaire. Pour un crime de fraude, tel que défini par le Code criminel, l'état d'esprit d'un accusé est un élément nécessaire à la condamnation. La fraude comprend nécessairement la malhonnêteté et est, par conséquent, un crime comportant turpitude morale.

Appel rejeté.-

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.V. Scott

The order of deportation reads:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile; and that
- (3) you are a member of the prohibited class described in paragraph (d) of Section 5 of the Immigration Act in that you have been convicted of a crime involving moral turpitude namely false pretences and that your admission to Canada has not been authorized by the Governor-in-Council".

The inquiry held by Special Inquiry Officer St-Louis, which resulted in this deportation order, was the result of a report made pursuant to Section 23 of the Immigration Act, dated October 2, 1967, a copy of which forms part of the record in this appeal, in the following terms:

E3-35726
Montréal, Québec
October 2, 1967

To: Special Inquiry Officer

Mr. Erskin Maximillian Turpin entered Canada as a non-immigrant visitor at Montreal International Airport on May 17, 1966. He has now ceased to be a non-immigrant and has reported to the undersigned in accordance with subsection (3) of Section 7 of the Immigration Act, and is seeking admission to Canada as a permanent resident.

Pursuant to Section 23 of the Immigration Act I have to report that I have examined Mr. Turpin and in my opinion he is not a Canadian Citizen or a person who has acquired Canadian domicile.

I am also of the opinion that it would be contrary to the Immigration Act to grant his admission to Canada as a permanent resident for the following reasons:

- (i) He is in the prohibited class referred to in paragraph (d) of Section 5 of the Immigration Act by reason of the fact that he has been convicted of a crime involving moral turpitude, namely fraud and his admission to Canada has not been authorized by the Governor-in-Council.

(Signed) E. Richardson
Immigration Officer"

The appellant, a citizen of the United Kingdom and Colonies, born in Barbados, entered Canada from Denmark as a non-immigrant visitor on May 17, 1966. A few days later, he made application at the Immigration Office in Montreal for admission to Canada, as a landed immigrant, pursuant to Section 7 (3) of the Immigration Act. He was given permission to work in Canada, and did so. On August 22, 1967, he was convicted by a judge of the Court of Sessions, Montreal, of two offences, under Section 323 of the Criminal Code of Canada.

Mr. Turpin is married, having married a Danish national in Montreal in April, 1967. Mr. Turpin's counsel stated at the inquiry and at the hearing of the appeal that Mrs. Turpin has also applied for admission to Canada as a landed immigrant.

Me Zaitlin argued the following points on behalf of the appellant:

1. Since the appellant was physically in Canada as a resident, when the circumstances arose which generated the report and the inquiry, the report should have been made pursuant to Section 19 of the Immigration Act, and the inquiry held only after a direction as provided by Section 26 of the Act. It was strenuously argued that a report under Section 23 should be confined to the case of persons "seeking to come into" Canada - in other words, persons who are not resident in Canada when the report is made.

2. The inquiry by Special Inquiry Officer St-Louis was contrary to natural justice and hence improper in that;

- a) the Special Inquiry Officer acted as both "prosecutor" and "judge";
- b) the appellant, Turpin, was required at the inquiry to testify against his own interest, contrary to Section 4 of the Canada Evidence Act;
- c) Counsel's request to the Special Inquiry Officer during the inquiry, that a witness (an immigration officer) be subpoenaed to testify at the inquiry, was refused;
- d) improper evidence was introduced at the inquiry, in that the Special Inquiry Officer had before him the "charge sheet" setting out eight criminal charges against Mr. Turpin, six of which were withdrawn before the trial which resulted in Mr. Turpin's conviction on only two of these charges, both pursuant to Section 323 of the Criminal Code of Canada, on August 22, 1967, as aforementioned."

3. The said convictions were not convictions of crimes "involving moral turpitude" as provided by Section 5(d) of the Immigration Act

4. Mr. Turpin's situation was such that, in the event of dismissal of the appeal on legal grounds, the Board could properly exercise the discretion vested in it by Section 15(1)(b)(ii) of the Immigration Appeal Board Act, and quash or stay the deportation order.

1) It is clear from the wording of Section 7(3) of the Immigration Act, that when Mr. Turpin applied for admission to Canada as a landed immigrant, he ceased to be a non-immigrant, and his status in Canada changed to that of a person "seeking admission to Canada" as a landed immigrant. Pending processing of his application he remained, legally, in Canada, married, was gainfully employed, and in addition established his own business.

Counsel for both parties were unable to direct the Board to any reported case dealing directly with the argument advanced by Mr. Zaitlin. The wording of the various relevant sections of the Immigration Act must therefore be examined.

Section 7(3) states, in part "Where a person who entered Canada as a non-immigrant ceases to be a non-immigrant ... and ... remains in Canada, he shall forthwith report such facts to the nearest immigration officer, and present himself for examination ... and shall for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada."

"Admission" is defined in Section 2(a) as including, among other things, "landing in Canada" and "entry into Canada".

"Landing" is defined by Section 2(n) as "the lawful admission of an immigrant to Canada for permanent residence".

"Entry" is defined by Section 2(f) as "the lawful admission of a non-immigrant to Canada for ... a limited time".

"Admission", as defined in the Act, denotes status. It has no geographical significance. Once a person physically in Canada reports to the nearest immigration officer, pursuant to Section 7(c), he is deemed to be a person "seeking admission to Canada" and is clearly in no different position from a person, physically outside Canada, who is "seeking admission" to the country,

Me Zaitlin argued, very persuasively, that because Section 23 contains the expression "seeking to come into Canada", its use must be restricted to persons physically outside Canada or at the gates of Canada at a port of entry. Section 23 is as follows:

"23. Where an immigration officer, after examination of a person seeking to come into Canada, is of the opinion that it would or may be contrary to a provision of this Act or the regulations to grant admission to or otherwise let such person come into Canada, he may cause such person to be detained and shall report him to a Special Inquiry Officer."

The Oxford dictionary defines "come" as "start, move, arrive, towards or at a point" ... "enter". "Into" "expresses motion or direction to a point within a thing".

In the French version of the Act, the verbs "entrer" or "venir" are employed where the phrase "come into" is used in the English version.

Larousse defines "entrer" as "passer du dehors au dedans, pénétrer" and "venir" as "se transporter d'un lieu dans un autre, se rendre chez quelqu'un".

It is clear from a study of the Act as a whole, that where the words "come into" are used in a phrase as an alternative to "admission", as in Section 23 "grant admission to or otherwise let such person come into Canada" or alone, for example Section 19(1)(e)(x) "came into Canada as a member of a crew", the words "come into" must be given their ordinary dictionary meaning, as it were, a geographical meaning, namely physically moving into Canada from outside that country. However, the phrase "seeking to come into Canada", which appears frequently in the Act, and is to be found in Section 23, in order to give effect to the scheme and intention of the Act as a whole, must be given a quasi-technical meaning, as including, but wider than, the meaning of the phrase "seeking admission". Since admission has no geographical connotation, the phrase "seeking to come into" applies to persons "seeking admission" regardless of their physical location or place of residence at the time such admission is sought.

Since Mr. Turpin was a person seeking admission to Canada pursuant to Section 7(3), he was included in the category of persons seeking to come into Canada, and all relevant sections of the Act referring to persons "seeking to come into Canada" apply to him. The inquiry as to his admissibility as a landed immigrant would have been - indeed must have been, since no other section of the Act deals with the situation - conducted pursuant to Section 20. In this connection, it is of interest to examine the case of Rebrin v Bird, (1961) S.C.R., 376. Miss Rebrin, a resident of Canada, having legally entered the country as a non-immigrant, applied for admission as a landed immigrant pursuant to Section 7(3). A deportation order was issued against her, and she made application for habeas corpus with certiorari in aid. In the course of his judgment, Kerwin C.J., remarked at page 378, after referring to Miss Rebrin's application for admission as a landed immigrant, and quoting Section 7(3), "She was therefore properly treated by the Immigration Officer as though she had appeared before him under Section 20(1) of the Immigration Act for examination as to whether she is or is not admissible to Canada ...".

Section 23, pursuant to which the report on Mr. Turpin was made, also applies to "a person seeking to come into Canada". Since this phrase by implication includes a person seeking admission to Canada, which Mr. Turpin was, the report respecting him was correctly made under Section 23. This is so notwithstanding the fact that Mr. Turpin, like Miss Rebrin, was in fact a legal resident of Canada at the time the report was made. It may be noted that a Section 23 report was used in Miss Rebrin's case, and accepted without question by the Court. It does not appear that any argument on this point was raised before the Court.

The Board agrees with Me Zaitlin that Section 19 applies to people physically in or residing in Canada - this is clear from reading the section as a whole - and as Mr. Turpin was a resident, a report concerning him could have been made by an immigration officer under Section 19. In other words, in circumstances similar to Mr. Turpin's, an immigration officer has a choice - he may report under Section 19, or under Section 23. That a person in Mr. Turpin's situation has no right to require that a report be made under Section 19 rather than under Section 23 is clear from the principle enunciated by Abbott, J., in Espaillet-Rodriguez v. Queen, (1964) S.C.R. 3, at page 7 "In its essential features the present appeal does not differ in any material respect from that in Ex parte Mannira (1959) O.W.N. 109. In both cases the appellant had entered Canada as a non-immigrant. As such, under Section 7(3) of the Act, he had no higher rights than a would-be immigrant presenting himself at a port of entry for admission as a permanent resident of Canada". Although both Espaillet and Mannira dealt with entirely different sections of the Act than those presently under consideration, the principle stated would appear to be correct and applicable in all circumstances to an applicant under Section 7(3).

(2)(a) Me Zaitlin argued strenuously that the inquiry was improper because, as is usual in immigration inquiries, Mr. St-Louis acted both as "prosecutor" and "judge". The powers and authority of a Special Inquiry Officer in respect of an inquiry are set out in Section 11(3) of the Act as follows:

11. (3) A Special Inquiry Officer has all the powers and authority of a commissioner appointed under Part 1 of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of an inquiry,

- (a) issue a summons to any person requiring him to appear at the time and place mentioned therein, to testify to all matters within his knowledge relative to the subject matter of the inquiry, and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to the subject matter of the inquiry;
- (b) administer oaths and examine any person upon oath, affirmation or otherwise;
- (c) issue commissions or requests to take evidence in Canada;
- (d) engage the services of such counsel, technicians, clerks, stenographers or other persons as he may deem necessary for a full and proper inquiry; and
- (e) do all other things necessary to provide a full and proper inquiry.

The inquiry must be conducted in accordance with Section 27 and the relevant regulations, and the Act then continues:

Section 28(1) "At the conclusion of the hearing of an inquiry, the Special Inquiry Officer shall render his decision as soon as possible and shall render it in the presence of the person concerned wherever practicable.

(2) Where the Special Inquiry Officer decides that the person concerned is a person who

- (a) may come into or remain in Canada as of right;
- (b) in the case of a person seeking admission to Canada, is not a member of a prohibited class; or
- (c) in the case of a person who is in Canada, is not proven to be a person described in paragraphs (a), (b), (c), (d) or (e) of subsection (1) of section 19,

he shall, upon rendering his decision, admit or let such person come into Canada or remain therein, as the case may be.

- (3) In the case of a person other than a person referred to in subsection (2), the Special Inquiry Officer shall, upon rendering his decision, make an order for the deportation of such person".

Subsection (4) of Section 28 is not relevant to the appeal before us.

The Act clearly provides that the Special Inquiry Officer who holds the inquiry shall render the decision thereon. It is true that Section 11(d) provides that he "may, for the purposes of the inquiry" engage the services of such counsel ... as he may deem necessary for a "full and proper inquiry", and (e) "do all things necessary to provide a full and proper inquiry", but both these provisions are permissive, not mandatory.

In the opinion of the Board, the Special inquiry Officer is in no sense a "prosecutor", nor is he a "judge". He has certain limited judicial functions, but in general, if his inquiry elicits evidence of facts which bring the subject within one or more of the provisions of the Immigration Act, the Special Inquiry Officer must make a decision in accordance with the Act. Me Zaitlin referred to the Section 23 report, which resulted in the inquiry in this case, as a "charge" of an "offence" under the Immigration Act, the "offence" apparently being, in Mr. Turpin's case, that he came within a prohibited class, namely that described in Section 5(d). This terminology would seem to be inexact. "Offence" is defined in Webster as "an infraction of law", Oxford defines it as "a breach of law, duty ... misdemeanour, fault" and cites Wharton "crime." "It is used as a genus comprehending every crime and misdemeanour; or as a species signifying a crime not indictable but punishable summarily or by the forfeiture of a penalty". Jowitt, in defining offence, says, "The word 'offence' has no technical meaning in English Law, but it is commonly used to signify any public wrong, including, therefore, not only crimes or indictable offences, but also offences punishable on summary conviction". Black defines the word as "a crime or misdemeanour; a breach of the criminal laws". Mitchell v Tracey, (1919) 58 S.C.R. 640, cited by Me Zaitlin, adopts the definition of "crime" in Mann v Owen, 9 B&S 595, "crime" is an offence for which the law awards punishment", - not very helpful to any definition of offence.

As Me Zaitlin himself admitted, and as was held by the B.C. Supreme Court in Re Vergakis, 1964 49 W.W.R. 720, with which the Board agrees on this point, the Immigration Act is not a criminal, it is a civil statute. In Vaaro v R. 1933 S.C.R. 36, Lamont, J., said: "There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge". Part VI of the Act does specifically create certain offences, but those Sections of the Act with which we are now concerned, notably Parts I - III of the Act, simply set up certain standards, though admittedly in a negative way, for the coming into, admission to, or remaining in Canada of persons wishing to do so, who are not citizens of Canada or domiciled in Canada as defined by the Act. Failure to meet, or departure from these standards, may result in the making of a deportation order against the person concerned - a result which may or may not be punitive - but in no sense can such failure be construed as an offence - an infraction of the law - it is at most non-compliance with standards set up by law.

In the case before us, Mr. Turpin was not "charged" with anything. The inquiry was directed, in the main, to eliciting information about certain activities of Mr. Turpin which had come to the Special Inquiry Officer's attention and which might bring him within one of the prohibited classes described in the Act, - in other words, the procedure in connection with Mr. Turpin was simply an inquiry within a certain frame of reference. This was within the power of the Special Inquiry Officer as defined in Section 11 (3), and after the completion of the inquiry his decision was rendered as required by Section 28.

The conduct of the inquiry in this case, was, as far as investigation by the Special Inquiry Officer and rendering the decision by the same Special Inquiry Officer strictly in accordance with the Immigration Act. Was the failure of the Special Inquiry Officer to call counsel to present the Department's case -- as he could have done under the powers vested in him by Section 11(3) -- contrary to the principles of natural justice? Though as indicated above, non-compliance with the standards set up in the Act is not an offence, the consequence of such non-compliance - namely deportation - is generally of such a serious nature that every possible safeguard should be provided for the person concerned. In the case before us, Mr. Turpin appears to have suffered no prejudice from the fact that Mr. St-Louis conducted the inquiry and rendered the decision. This decision was based on the facts proved at the inquiry and on no others - this is clear from a perusal of the record, the minutes of the inquiry and exhibits and attachments thereto. This is so even though Mr. St-Louis had before him, and produced, a piece of evidence which he should not have had, namely the "charge sheet" setting out eight alleged offences against the Criminal Code, six of which were withdrawn at the trial of Mr. Turpin on August 22, 1967. This piece of evidence was quite improper, but it is clear that Mr. St-Louis, rightly, was not in any way influenced by it in reaching his decision.

Me Zaitlin cited in support of his argument on this point the case of Szilard v Szasz, (1955) S.C.R. 3. In that case an arbitrator was found to have been jointly engaged in a real estate speculation with one of the parties, unknown to the other party, and his award was set aside. Rand, J., said at page 4 "From its inception, arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to ..."

The Canadian Bill of Rights, 1960 RSC, 44 includes the following provision:

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

"(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;"

There appears to be no reported decision on which this section was directly considered in connection with an inquiry by a Special Inquiry Officer. It was raised, to be sure, in Re Fraser 1963 C.C.C. 139, but in that case the deportation order had been made long before the passing of the Bill of Rights,

and the Court declined to give the latter Act retroactive effect. In Rebrin v. Bird, (1961) S.C.R. 376, the Bill generally was invoked, and was dealt with by the learned judges in general terms notwithstanding that the Bill had been passed after the deportation order in question was made. It does not appear that Me Zaitlin's point, that the Special Inquiry Officer acted improperly in being both "prosecutor" and "judge", was directly raised in the Rebrin case, but his reason for raising this point - the fact that the Special Inquiry Officer has before him the whole file which may contain matters prejudicial to the person in question, but which they have no opportunity to examine and answer - was raised in Rebrin. It is significant that the learned judges examined the facts, and found that there was "nothing to warrant the suggestion that matters irrelevant to the proper determination of the appeal to the Minister were considered", (per Kerwin, C.J., at p. 382). It would appear, therefore, that the mere possibility of access to irrelevant or prejudicial evidence by the deciding official (in this case the Special Inquiry Officer) does not automatically invalidate a deportation order, notwithstanding the Bill of Rights. The facts of each case must be examined and in the present case there is no evidence of any prejudice whatever to Mr. Turpin arising out of the fact that the Special Inquiry Officer had access to the file, or from the fact the same Special Inquiry Officer conducted the inquiry and rendered the decision.

(b) In view of the finding that non-compliance with the Immigration Act is not an offence, Section 4 of the Canada Evidence Act would appear to be inapplicable to the subject of an Immigration inquiry. This section is as follows:

4.(1) Every person charged with an offence is a competent witness for the defence"

Me Zaitlin argued that Mr. Turpin could not be called as a witness by the Special Inquiry Officer since under the terms of Section 4(1) he was a competent witness only for the defence. However, the effect of Section 11(3) and Section 50(e) of the Immigration Act is to make the subject of an inquiry a compellable witness at the inquiry.

Section 11(3) provides that a "Special Inquiry Officer may, for the purpose of an inquiry,

- (a) issue a summons to any person requiring him to appear at the time and place mentioned therein, to testify to all matters within his knowledge relative to the subject matter of the inquiry

Section 50 provides every person who

- (e) refuses to answer a question put to him or does not truthfully answer all questions put to him at an examination or inquiry under the Act; is guilty of an offence

In Vaaro v R. (1933) SCR 36, Lamont, J., said at page 42 "In many cases the immigrant himself must necessarily be the chief witness".

The subject of an inquiry is however entitled to the protection of Section 5 of the Canada Evidence Act, which is as follows:

"5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any person a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding, at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

In Re Vergakis (op. cit.), Hutcheson, J., in Chambers, said (at page 727) "counsel for the applicant submits that in giving evidence before a Special Inquiry Officer, the applicant (for a writ of habeas corpus) would not be a 'witness within the meaning of that section, and therefore, would not be entitled to the protection given.'

"This contention I do not accept: See R.V. Mazerall (1946) O R 511 in which McRuer C.J.H.C. stated at page 514:

"As I interpret the authorities, the section applies to any witness lawfully giving evidence under oath before any properly constituted legal tribunal which has the power to take evidence under oath."

The principles enunciated in Batary v Atty. Gen. for Saskatchewan, (1965) S.C.R. 465, would appear to be inapplicable to the case before us. There, Batary was charged with murder, and it was held (Fauteux, J., dissenting) that the combined effect of ss. 2, 4(1) and (5) of the Canada Evidence Act and ss 448 and 488(3) of the Criminal Code does not render an accused a compellable witness at the coroner's inquest.

(c) The refusal of Special Inquiry Officer St-Louis to issue a summons to Officer Richardson, as requested by Me Zaitlin at the inquiry, was within his jurisdiction under the Act. Section 11(3)(a) is permissive, in that the Special Inquiry Officer may issue a summons. However, as a matter of natural justice, since there is no way in which the subject of an inquiry can compel the attendance of a witness to testify on his behalf, the Special Inquiry Officer should, as a general rule, issue a summons pursuant to Section 11(3) in all cases where such a summons is requested, except where there exist good reasons to refuse. In the case before us, Special Inquiry Officer St-Louis acted wrongly in refusing to summons Officer Richardson when requested by Me Zaitlin, but to send the case back now with direction to reopen the inquiry so that Officer Richardson might be heard would appear to work a greater injustice to Mr. Turpin than the failure of Officer Richardson to appear in the first place. In event, Mr. Turpin appears to have suffered no prejudice. The inquiry clearly proved the fact on which the deportation order was based - the conviction - and the circumstances leading up to the conviction, and it is extremely unlikely that testimony by Officer Richardson could have added to or

detracted from the evidence actually adduced. The case of Foufas, an unreported decision of the B.C. Court of Appeal (April 28, 1967), which was cited to us by counsel for the Minister, would appear of doubtful value on this point. In that case, Davey, J.A., said "It seems to me quite clear that, under Section 11 of the Act, the obligation (sic) to issue a summons to the witness is based upon the premise that the witness has relevant testimony to give" The learned judge refused to set aside a deportation order on the grounds of refusal to summons a witness, since he was satisfied that the witness' testimony would not have been "relevant". He did not direct his mind to the principles of natural justice. Moreover, from a practical point of view, it is often impossible to tell whether testimony will be relevant until it is heard.

(d) This point has been dealt with under 2(a) above.

3. The ground for deportation in this case was that Mr. Turpin had been convicted of "a crime involving moral turpitude namely false pretences", thus becoming a member of a prohibited class as described in Section 5(d) of the Act. Documentary evidence of this conviction is provided by a certified copy of a certificate of conviction by a Judge of Sessions, bearing date of August 22, 1967, and showing that Mr. Turpin had pleaded guilty to two counts of fraud, contrary to Section 323 of the Criminal Code of Canada - as follows:

"Furthermore, at Montreal, district of Montreal, on April 7, 1967, Erskine Turpin did unlawfully by deceit, falsehood or other fraudulent means, defraud the Royal Bank of Canada, Montreal Branch, Place Ville Marie, of the sum of \$1,000.00, the property of the said bank, committing thereby an indictable offence, according to Section 323 of the Criminal Code.

Furthermore, At Montreal district of Montreal, on April 7, 1967, Erskine Turpin did unlawfully by deceit falsehood or other fraudulent means, defraud The Royal Bank of Canada, Dorchester & Guy, of the sum of \$500.00, the property of the said bank, committing thereby an indictable offence, according to Section 323 of the Criminal Code."

The certificate of conviction bears the following note as to sentence:

"Vu remboursement intégral: Sentence suspendue & cautionnement personnel \$200.00. de garder la paix durant 2 ans".

Section 323(1), the relevant subsection of the Code, is as follows:

"323. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money of valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years."

In view of the maximum sentence set out in this subsection, and the actual sentence imposed on Mr. Turpin, it would appear that the learned trial judge took a lenient view of the charge, notwithstanding Mr. Turpin's plea of guilty. His explanation of this plea at the inquiry was that he was frightened, and furthermore did not understand the proceedings at the trial, which took place in French. Mr. Turpin's explanation of the circumstances leading up to the

charge and conviction was given in detail at the inquiry, and to a lesser extent, at the hearing of his appeal. This explanation, given under oath, and which the Board considers credible, is that Mr. Turpin drew the cheques, signed by himself and payable to himself, on the expectation that a sum of money sufficient to cover the cheques had been paid in by his business partner to the Banks in question, in one of which Mr. Turpin had an account. Mr. Turpin's testimony before the Board on this point was as follows:

"Counsel:

Mr. Turpin, On October 19, 1967, you appeared before Mr. St-Louis, an Immigration Inquiry Officer and you were questioned in connection with your status in Canada?

Appellant:

Yes.

Counsel:

This inquiry, which began on October 19, was postponed a number of times?

Appellant:

Yes.

Counsel:

On November 16, 1967, you were asked a number of question by Mr. St-Louis. On page 26, one of the questions put to you in the following:

"When you did make these cheques did you at the time have the necessary funds in the bank to cover the payment of these cheques?

and your answer was:

"Upon expectation of receiving this total amount in the bank at the time that's why the cheques returned NSF."

The next question was:

"Where these cheques made by and for yourself?"

and your answer was:

"That's right."

And to the question

"Did you yourself present them at the bank for payment?"

you answered

"Yes".

And to the question

"How had you anticipated that you would be able to pay these amounts back?"

you answered

"I have at present this amount of money owed out to me and it was due to be deposited in the bank. At present I have \$2,200.00 to be deposited in the Bank."

Do you recall that answer?

Appellant:

Yes.

Counsel:

Will you tell the Board exactly what you meant by that answer to that particular question?

Appellant:

I have a business partner, which I still have at present, and he was going to deposit this money that I had withdrawn the cheques for into the bank, which he didn't. The other statement which seems to be interwoven into my answer, is that at the present time that I was sitting with Mr. St-Louis, I had this money from another business going for me also. When I answered this it got a bit misconstrued but this is what I was trying to say. He was supposed to put this money in to cover me when I went to withdraw the money. I asked him if he had deposited the money and he said yes. A few days later he said "I have troubles." I said, "Look, put it in the bank." He still owed me.

Chairman:

Were you expecting your partner to pay the money to two different banks?

Appellant:

Yes.

Commissioner Legaré:

Did you have two accounts?

Appellant:

One in the Royal Bank of Canada in Place Ville Marie. I went to the other bank and withdrew. My partner was supposed to put this money and he didn't. The next time I know I was in big trouble.

Chairman:

He was to put it in both branches?

Appellant:

Yes. I had an account in the Place Ville Marie but not the other.

M. Legaré:

Did you have difficulty in cashing the cheque?

Appellant:

No.

The question before the Board is, was this a "crime involving moral turpitude". It must first be decided whether this phrase must be read in general or in particular. In the case before us, must the crime of fraud always involve "moral turpitude" - in which case the fact of conviction therefore is conclusive- or may the circumstances leading up to the conviction in this particular case be examined by the Board in order to ascertain whether "moral turpitude" was present in Mr. Turpin's conduct?

The phrase "moral turpitude" is foreign to Canadian law and appears to have been borrowed from American immigration law, where it was first introduced in 1891. It first appeared in the Canadian Immigration Act in 1906. There are a good many American cases which seek to define and interpret the term, but only three Canadian cases, none of which, in the Board's opinion, came to grips with the problem.

The generally accepted definition of moral turpitude is to be found in Bouvier's law dictionary:

"An act of baseness, vileness or depravity in the private and social duty which a man owed to his fellow men or to society in general, contrary to the accepted and customary rule or right and duty between man and man (In re Henry, 15 Idaho 755)."

In Hecht v McFaul, (1961) Que. S.C. 392, one of the three Canadian cases on this point, the learned judge cited, with tacit approval, the definition set out "Words and Phrases" (U.S.) (1952) Vol. 27, as follows (in part):

"In general "Moral Turpitude" is anything done contrary to justice, honesty, modesty or good morals "Crime malum in se." Generally speaking, crimes malum in se involve moral turpitude."

"The phrase "moral turpitude" has a definite meaning including only the commission of crimes malum in se and those classed as felonies; it is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man, everything done contrary to justice, honesty and good morals"

The Board is in agreement with the remark of Monnin, J., in King v Brooks, (1960)

3. W.W.R. 673 at p. 683:

"I agree entirely with the American decisions that the word "moral" preceeding the word "turpitude" adds nothing to the meaning of it. It is a pleonasm which has been used only for the sake of emphasis."

The Board wishes to record its entire disapproval of the use of the phrase "crime involving moral turpitude". It agrees with the opinion expressed by Jackson, J., in his dissenting judgment (concurring in by Frankfurter and Black, J.J.,) in Jordan v DeGeorge, (1951) S. Ct. 703, that the phrase "crime involving moral turpitude" in the American Immigration Act is so vague and uncertain that to order a person deported on the ground of having committed such a crime is to deprive such a person of his right to due process. He said, at page 714: "The test by which vagueness was to be determined according to the Connolly case was that Legislation uses terms 'so vague that men of Common Intelligence must necessarily guess at its meaning and differ as to its application': 269 US 391; 46 S Ct 127. It would seem to be difficult to find a more striking instance than we have here of such a phrase since it requires even Judges to guess and permits them to differ. We do not disagree with a policy of extreme reluctance to adjudge a congressional Act unconstitutional but we do not here question the Power of Congress to define deportable conduct. We only question the power of Administrative Officers and Courts to decree deportation until Congress has given an intelligible definition of Deportable Conduct".

The Board, however, must deal with the phrase as it is found in the Canadian Immigration Act, and adopting the definitions above set out, at least until a better definition can be devised, it appears clear that the crime must necessarily involve some element of depravity, baseness, dishonesty, or immorality.

As pointed out above, it is possible to read the phrase "crime involving moral turpitude" in two ways. It may be read as referring to the particular crime of which the person concerned has been convicted, in which case the Special Inquiry Officer and the Board can go behind the conviction to ascertain the circumstances, or it may be read as referring generically to the crime of which the person concerned has been convicted in which case the Special Inquiry Officer and the Board cannot go behind the conviction to ascertain the circumstances, but must ascertain if the act leading to the conviction was a crime and if so, whether that crime, generically, necessarily involves some element of depravity, vileness, baseness, dishonesty or immorality.

The three Canadian cases dealing with moral turpitude did not deal directly with this problem. The implication, however, in all these cases would appear to be that the second alternative was applied.

In Hecht v McFaul an application was made for a writ of habeas corpus in respect of a detention pursuant to a deportation order made under Section 5(d) of the Immigration Act. The subject of the order had been convicted in the U.S. for making false, fictitious and fraudulent statements concerning export shipment and for uttering a false bill of lading, with intent to defraud. St-Germain, J., said at page 395, "Petitioner was not accused of

simply having infringed a regulation or a law containing no criminal import, but the condemnation of petitioner was for making false, fictitious statements with intent to defraud. This is certainly a crime punishable not only in the United States but also in Canada Even if it was not punishable by law, it could certainly be declared that the conviction implies a crime of moral turpitude"

It must be pointed out that this case involved an application for a writ of habeas corpus alone with no application for certiorari in aid. The learned judge stated at page 394: "On a writ of habeas corpus, all the Court has to decide is whether or not the detention of petitioner is arbitrary or founded on a text of law. There being no writ of certiorari in aid, the Court may not examine the motives upon which the Special Inquiry Officer or the Appeal Board founded their decision ". The learned judge quoted in support of this statement the following extract from Rolling v Langlais, (1958) Q.B. 207, at page 210" "Bref de certiorari ancillaire seul, peut permettre d'examiner les motifs sur lesquels la Commission d'enquête s'est appuyée pour ordonner la déportation". It may be suggested that the French words "les motifs" mean "grounds" rather than "motives".

In Re Brooks, (1945) 1 D.L.R. 726 (Ontario), Brooks was ordered deported as a member of a prohibited class pursuant to the predecessor of Section 5 (d). The evidence offered before the Special Inquiry Officer was that Brooks had been charged in New Jersey with larceny and pleaded not guilty. He afterwards changed his plea to non vult to receiving and was given a suspended sentence, with probation for one year on condition of restitution. At the inquiry Brooks said he was innocent and had never consented to a plea of non vult.

Rose, C.J.H.C., said at page 731: "Foreign law is a fact to be proved, and there being no evidence either as to the meaning or as to the effect in New Jersey of a plea of non vult, I do not think that (the Special Inquiry Officer) had before him any evidence that Brooks had been convicted of anything. And even if the record could be reated as evidence of conviction of some offence I think it could not be treated as evidence of conviction of a crime involving "moral turpitude", because (the Special Inquiry Officer) had not before him any evidence as to what is requisite in New Jersey to constitute the offence of "receiving"..... Without knowing the definition of the offence it seems to be very rash to assume that it constitutes a crime involving "moral Turpitude".

Although the learned judge did not deal directly with the point, it would appear that he was concerned with the consideration of a crime generically rather than with the circumstances of the particular offence for which the subject was ordered deported.

In King v Brooks, (1960) 31 W W R 673, which was affirmed without reasons, (1960) 33 W.W.R. 192, King was ordered deported under 5(d) be reason of having been convicted in the United States of, among other things, passing NSF cheques. No details of the crimes were given at the inquiry and the subject thereof admitted the conviction. An application for certiorari was refused by Monnin J., and it is clear from his judgment that he was considering the crimes generically and not specifically in determining whether "moral turpitude" was inherent therein.

Many American cases have dealt directly with the problem and the Board is impressed with the statement of Noyes, Circuit Judge in U.S. Ex rel. Mylius v Uhl, 203 F 152, at p. 153:

"In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments or conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular cases evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws."

An appeal from the decision was dismissed: 210 F 860.

The learned judge has pointed up the inconsistencies and injustices which may result if individual circumstances are examined. If the Special Inquiry Officer and the Board must go behind a conviction to see if the circumstances of the particular crime in question involve moral turpitude, in some cases, inadequate evidence would be available, in other cases no evidence, in yet other cases complete evidence from the point of view of the person concerned, and in all cases one-sided evidence - that of the person convicted, since it is not in the Special Inquiry Officer's or the Board's power to rehear the evidence which led to the conviction, nor is it generally practical to obtain a transcript of the trial. Fair and consistent treatment of persons ordered deported on the ground of conviction of a crime involving moral turpitude would therefore be an impossibility, and the same arguments apply, though perhaps not as strongly to persons who have admitted committing such a crime.

A further argument in favour of dealing with crimes involving moral turpitude generically rather than individually may be found in considering the Immigration Act as a whole.

Section 19(1)(e)(iii) makes a person subject to deportation who "has been convicted of an offence under the Criminal Code."

Section 19(1)(e)(v) makes a person subject to deportation who "has, since his admission to Canada, become a person who, if he were applying for admission to Canada, would be refused admission by reason of his being a member of a prohibited class other than the prohibited classes described in paragraphs (a), (b), (c) and (s) of Section 5.

We then refer to Section 5(d) of the Act, under which Mr. Turpin was ordered deported, and which describes a prohibited class of persons as "persons who have been convicted of or admit having committed any crime involving moral turpitude, except persons whose admission to Canada is authorized by the Governor in Council upon evidence satisfactory to him that:

- (i) at least five years, in the case of a person who was convicted of such crime when he was under twenty-one or more years of age, or at least two years, in the case of a person who was convicted of such crime when he was under twenty-one years of age, have elapsed since the termination of his period of imprisonment or completion of sentence and, in either case, he has successfully rehabilitated himself, or
- ii) in the case of a person who admits to having committed such crime of which he was not convicted, at least five years, in the case of a person who committed such crime when he was twenty-one or more years of age, or at least two years, in the case of a person who committed such crime when he was under twenty-one years of age, have elapsed since the date of commission of the crime and, in either case, he has successfully rehabilitated himself;"

Even if we accept the interpretation of the phrase "crime involving moral turpitude" as referring to the inherent nature of a crime, the sections above quoted point up a fundamental - even grotesque - inconsistency in the Act. Persons convicted of an offence under the Criminal Code are subject to deportation under Section 19(1)(e)(ii) whether the offence involves moral turpitude or not. Persons coming within 5(d) are subject to deportation only if they have been convicted (or have admitted committing) a crime involving moral turpitude. To accept the proposition that in the latter case, the circumstances of the particular crime in question may be examined, would be to render the Act even more illogical and inconsistent than it is.

This problem is really pointed up by this appeal, since if Section 19 had been applied in Mr. Turpin's case, he almost certainly would have been ordered deported under Section 19(1)(e)(ii), and the question of moral turpitude would never have arisen.

Though the Board must interpret the particular section of the Act before it, this interpretation must be made in the light of the Act as a whole. The phrase "crime involving moral turpitude" must therefore be taken to refer to the inherent nature of the crime, which will be analyzed in its generic sense to see whether, in the abstract, it necessarily involves moral turpitude.

Mr. Turpin was convicted on two counts, after having pleaded guilty to the offence set out in Section 323(1) of the Criminal Code. Section 323(1) reads as follows:

"323(1). Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property money or valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years."

Does the crime of fraud as defined by this section necessarily involve depravity, vileness, baseness, dishonesty or immorality? Since all these descriptive nouns would appear to imply conscious, voluntary acts, it is first necessary to enquire whether mens rea is a necessary ingredient for conviction under Section 323(1). A study of Tremear, 6th Ed., would indicate that it is. The case of R. v Gregg, (1964) 49 W.W.R 732, is referred to (among others) as authority for the proposition that the state of mind of the accused is an essential ingredient of the offence. Since fraud as described in Section 323(1) necessarily involves dishonesty, it is a crime involving moral turpitude within the meaning of the Immigration Act. The case of King v Brooks (op. cit.) is of interest.

There, evidence was introduced before the Special Inquiry Officer that King had been convicted in the United States of passing NSF cheques. Monnin J., states (at page 683):

"I find very little merit in the applicant's claim that the admitted offences of issuing false cheques and being the operator of worthless cheques are not crimes of moral turpitude. These are acts of baseness in the duties which a man owed to his fellow men, contrary to the accepted rule of right and duty between man and his fellow men. Issuing false or worthless cheques, thus depriving fellow citizens of their property, namely their money, can be nothing else than fraudulent and involves moral turpitude. It is certainly something done contrary to justice and honesty"

In view of its decision on the above points, the Board finds that the deportation order against Mr. Turpin was made in accordance with the law, and the appeal must be dismissed. However, since Mr. Turpin was not a permanent resident of Canada at the time the order was made, the Board is empowered to consider the existence of compassionate or humanitarian considerations in determining whether Mr. Turpin is entitled to special relief pursuant to Section 15(1)(b)(ii) of the Immigration Appeal Board Act.

In view of the evidence adduced at the inquiry and at the hearing of the appeal, the Board finds that this is an appropriate case for special relief. Mr. Turpin entered Canada legally, made application for admission as a landed immigrant in accordance with the provisions of the Immigration Act, has had an excellent work record since his arrival in Canada, and has established a small business of his own. In addition, he is married and has established a home in Montreal. His explanation of the circumstances leading up to his conviction in August, 1967, is considered credible by the Board, and goes far to negate any suggestion of criminal intent or of criminal tendencies. The Board, therefore, pursuant to the powers vested in it by Section 15 of the Immigration Appeal

Board Act, directs that the deportation order issued against Mr. Turpin be stayed for a period of six months, at the expiration of which the Board will review its decision on this point.

Counsel:

For the appellant: A.H.J. Zaitlin, Q.C.

For the respondent: E.M. Thomas, Q.C.

Bertram Patrick PETERSEN, appellant and

The Minister of Manpower and Immigration

Decision: February 26, 1968
(File no: 68-5024)

Coram: J.C.A. Campbell, Vice-Chairman, G. Legaré, U. Benedetti

Admission under S. 34(3)(f) of Immigration Regulations is permissive - Construction of the words "Notwithstanding Section 28(1)" as used in S. 34 of Immigration Regulation. - Requirement of medical certificate, mandatory - Refusal of Medical examination - occupational demand: independent applicant, outside Canada, inside Canada. - Arranged employment. - changes between time of original assessment and the inquiry. - Inquiry adjourned and subject re-assessed. - Substitution of opinion in regard to assessment. - Immigration Regulations: S. 29(1); 32(2)(c).-

L'admission en vertu de l'article 34(3)(f) du Règlement de l'immigration est facultative. - Portée des mots "nonobstant les dispositions de l'article 28" tels qu'utilisés à l'article 34 du Règlement de l'immigration. - Certificat médical est obligatoire. - Refus d'accorder un examen médical. - Offres d'emploi: requérant indépendant au Canada, hors du Canada. - Emploi réservé. - Changements entre le temps de l'appréciation originale et l'enquête. - Suspension d'enquête et nouvelle appréciation - Substitution d'opinion dans l'appréciation - Règlement de l'immigration: Art. 29(1); 32(2)(c). -

Held: The use of Section 28(1) as grounds for a deportation order is quite correct if the person seeking permanent admission fails to meet the conditions and tests set out in Section 34(3)(f). Admission under Section 34(3)(f) is permissive, not mandatory on the part of the Immigration Officer. "If the person concerned fails to meet the conditions for admissibility, then all other requirements of the Immigration Act and Regulations, including Section 28(1) apply"

The words "notwithstanding Section 28(1) as used in Section 34 cannot be construed to mean that Section 28(1) has been repealed. The medical certificate required by Section 29(1) is mandatory. Failure to comply with this requirement is a valid ground for deportation, although if the applicant asked for a medical examination and was refused, the Board might come to a different conclusion. On the question of occupational demand Section 34(3)(f) must be contrasted with Section 32(2)(c) of the Immigration Regulations. An independent applicant in Canada is to be assessed in accordance with the norms set out in Schedule A "except with respect to arranged employment". These words mean that the applicant in Canada must satisfy the assessing officer that the occupation stated in his application is either one at which he is already working or for which he has a definite promise of specific employment. If such arranged employment changes between the time of the original assessment and the inquiry, the Special Inquiry Officer should adjourn the inquiry and have the subject thereof re-assessed. This was not the case here. A Special Inquiry Officer cannot substitute his opinion for that of the assessing officer unless it can be shown that the assessing officer acted on the wrong principle or that on the evidence the decision was manifestly wrong. The appeal was dismissed.

Arrêt: L'article 28(1) peut effectivement motiver une ordonnance d'expulsion dans le cas où la personne qui cherche à être admise à titre permanent ne satisfait pas aux conditions et aux normes d'examen décrites dans l'article 34(3)(f) du Règlement de l'immigration. Suivant l'article 34(3)(f), le fonctionnaire à l'immigration peut admettre un immigrant, sans être obligé de le faire cependant: "Si la personne concernée ne satisfait pas aux conditions d'admission, toutes les autres exigences de la Loi et du Règlement de l'immigration s'appliquent, y compris l'article 28(1)". Les mots "nonobstant les dispositions de l'article 28(1)", dans l'article 34 du Règlement de l'immigration ne peuvent signifier que l'article 28(1) a été abrogé. Le certificat médical requis par l'article 29(1) du Règlement de l'immigration est obligatoire. Le défaut de se conformer à cette exigence est un motif suffisant d'expulsion, quoique la Commission puisse en venir à une conclusion différente si le requérant a demandé un examen médical qu'on lui a refusé. Pour ce qui regarde l'offre d'emploi, on doit opposer l'article 34(3)(f) à l'article 32(2)(c) du Règlement de l'immigration. Un requérant indépendant et résidant à l'extérieur du Canada doit être apprécié suivant l'offre qui existe au Canada pour l'emploi qu'il occupera vraisemblablement. Un requérant indépendant déjà au Canada doit être évalué apprécié selon les normes énoncées à l'annexe "A", "sauf en ce qui a trait à un emploi réservé". Ces termes signifient que le requérant résidant au Canada doit convaincre l'appréciateur qu'il occupe déjà l'emploi déclaré dans sa demande ou qu'il a reçu une promesse certaine d'engagement pour cet emploi. S'il survient des changements quant à l'emploi promis entre le moment de la première appréciation et l'enquête, l'enquêteur spécial doit remettre l'enquête à plus tard et apprécier le requérant à nouveau. Cela n'a pas été le cas ici. Un enquêteur spécial ne peut pas substituer son opinion à celle de l'appréciateur, à moins qu'on puisse prouver que l'appréciateur s'est fondé sur un principe faux ou que manifestement il a pris une décision erronée. L'appel est rejeté.

Le jugement de la Commission a été rendu par:
The judgment of the Board was delivered by:

J.C.A. Campbell -

The order of deportation reads:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile and that;
- 3) you are a member of the prohibited class described under paragraph (t) of section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Regulations by reason of:
 - (i) you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1;
 - (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part 1;
 - (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1."

Petersen, the appellant, was born on July 24, 1945, at Capetown, South Africa, the only son of Benjamin Adolph Petersen and Freida née Barnard. His parents and three sisters are resident in Capetown. In South Africa the appellant is known as "coloured", his mother being white and his father a negro. In 1945, his mother, because she was married to a negro, was reclassified by the Government as a "coloured" person. Petersen, who is single, left school about the age of 17, helped his father for approximately one year in a grocery warehouse, did some clerical work, toured as a singer with an operatic company for three months, then became a full-time reporter for the Cape Herald P.T.Y. Limited (a newspaper for "coloureds"). Prior to his employment with the Cape Herald P.T.Y. Limited, he had done some free-lance reporting and sold articles to several other newspapers in Capetown. Petersen entered Canada as a non-immigrant on May 23, 1967, for a period to expire on July, 1967. An extension of his non-immigrant status was granted until October 2, 1967. On September 25, 1967, he completed an application for permanent admission to Canada. On his application form, he stated his job in Canada would be that of an apprentice machine operator. He had been promised this employment by Doone Twines Limited, Kitchener, Ontario. He did not take this work as permission to work from the Department of Manpower and Immigration was not received by him until October 24, 1967. However, he subsequently obtained employment with B.F. Goodrich commencing as an apprentice spinning machine operator, six weeks after which he "went on my own". He remained with this firm, B.F. Goodrich, as a spinning machine operator until January, 1968. He is now employed by Raymond Stanton Public Relations assisting with the preparation of news releases, newsletters and other publications prepared by Raymond Stanton for a number of clients.

There was no dispute regarding the fact that the appellant is not a Canadian citizen nor has he acquired Canadian domicile within the meaning of the Immigration Act.

Counsel for the appellant attacked the validity of the deportation order on the following grounds:

- (1) That Section 34 of the new Immigration Regulations, Part I, clearly envisages the right of applicants who are visitors in Canada under the new regulations to apply without a visa and therefore to that extent the previous requirements for a visa contained in Section 28(1) of the earlier Immigration Regulations must be regarded as being repealed.
- (2) That at no stage during the Inquiry or before it was the appellant asked to have or given any opportunity for examination by a Medical Officer appointed by the Department and he had no knowledge where or how he should apply and no opportunity was afforded him to get a medical certificate.
- (3) That the Special Inquiry Officer misdirected himself by considering only the occupational demand for the occupation of a machine operator, for which the appellant was given the mark of "O", and which was not the occupation for which he was qualified. That both the Special Inquiry Officer and the officer who assessed the appellant erred in principle in not directing their minds to the assessment in regard to the occupational demand for which the appellant was qualified.

Mr. Brewin referred to the provisions of Section 34 of the current Immigration Regulations, Part I, which deals with applicants in Canada who enter as non-immigrants under Section 7(1) of the Immigration Act and who subsequently apply for permanent admission. He argued that if an applicant in Canada is given the right to apply under Section 34 of the Immigration Regulations, Part I, the assumption must be and it is fairly obvious that he cannot be expected to have an immigrant visa as required by Section 28(1) of the Regulations, which can only be obtained from a visa officer stationed outside of Canada, or in the alternative the non-immigrant visa, which the applicant has, in a visa in accordance with Section 28(1) of the Immigration Regulations. Therefore to use Section 28(1) as a ground for deportation in this case is improper as it is not a valid ground. Mr. Gill, Counsel for the Minister, argued that Petersen's application for permanent residence in Canada was accepted in accordance with the provisions of the Immigration Regulations as they apply to an independent applicant. As such an applicant, he was required to obtain 50 units of assessment after being examined in accordance with Schedule "A". He obtained only 39 points on assessment which said assessment was made on exactly the same basis as if Petersen had applied overseas, with the exception of arranged employment. Therefore he would have been denied a visa overseas. That being so, there was no jurisdiction in the Immigration officer to set the visa requirements aside and the requirement, in this case the lack of an immigrant visa, was properly applied.

Section 34(3) of the Immigration Regulations, Part I, is as follows:

- "34.(3) Notwithstanding section 28, an applicant in Canada who
- (a) if outside Canada would be an independent applicant; and
 - (b) is not in possession of an immigrant visa or letter of pre-examination but, in the opinion of an immigration officer, would on application be issued a visa or letter of pre-examination if outside Canada;

may be admitted to Canada for permanent residence if

- (c) he complies with the requirements of the Act and these Regulations;
- (d) he makes application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for him by an Immigration officer;
- (e) he has not taken employment in Canada without the written approval of an officer of the Department; and
- (f) in the opinion of an Immigration officer, he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment."

Prior to the rendering of these reasons for disposal of this appeal these same two points (i.e.) lack of a valid and subsisting immigrant visa and medical certificate as required by Sections 28(1) and 29(1) of the Immigration Regulations, Part I, were considered in the case of the appeal of Aubrey Wellesley Jackson, Immigration Appeal Board file 68-5053, on Tuesday February 27, 1968. In that case Mr. Jackson was ordered deported on the following grounds:

"I have reached the decision that you may not come into or remain in Canada as of right in that

- (1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile and that:
- (3) you are a member of the prohibited class under paragraph (t) of Section 5 of the Immigration Act in that you cannot comply with the requirements of this Act or the Regulations by reason of the fact that:
 - (i) you have taken employment in Canada without the written approval of an officer of the Department as required by paragraph (e) of subsection (3) of Section 34 of the Immigration Regulations, Part I;

- (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part I;
- (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I."

No one appeared for the appellant and after hearing the submission by Counsel for the Minister of Manpower and Immigration, the Board gave oral judgment dismissing the appeal.

In the instant case, the Board decided to give written reasons for its disposal of the appeal.

Section 34 deals with the admissibility of persons to Canada. The section sets out the conditions and tests which must be met and complied with by an Applicant. If he is successful then an Immigration officer may admit such person for permanent residence notwithstanding Section 28. This is a permissive act on the part of the Immigration officer. There is no mandatory requirement that he shall admit the person concerned. If the person concerned fails to meet the conditions for admissibility then all other requirements of the Immigration Act and Regulation, including Section 28, apply. It follows, therefore, that Petersen not having been able to meet the requirements of subsection (f) of Section 34(3) of the said Regulations could be ordered deported as a result of an Inquiry properly held, as in this case, on the ground that he was not in possession of an immigrant visa as required by Section 28(1) of the Immigration Regulations, Part I.

Section 34(3) of the Immigration Regulations, Part I, commencing with the words "Notwithstanding Section 28, an applicant in Canada who", then goes on to state "may be admitted to Canada for permanent residence if, (f), "in the opinion of an Immigration officer, he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment".

What is the construction to be placed on the words "Notwithstanding Section 28" as used in Section 34? Can they be said to mean that the requirements of Section 28(1) of the said Regulations have been repealed? "Notwithstanding" is defined in the Shorter Oxford English Dictionary, 3rd edition at page 1341 as "A. prep. 1. Despite, in spite of. a. Following this, that. B. adv. Nevertheless, still, yet. 3. conj. although".

"Repeal" is defined in the same dictionary as "1. trans. To revoke, rescind, annul (a resolution, law, sentence, etc.). b. To recall, withdraw (a privilege, grant, etc.). 2. To withdraw or retract (a statement); to give up, abandon (a thought, feeling, etc.). 3. a. To recall (a person) from exile. b. To call or summon back."

From the above-quoted definitions I think it is clear that the phrase "Notwithstanding Section 28" as it appears in Section 34(3) of the Immigration Regulations, Part I, cannot be construed to mean that the requirements of Section 28(1) have been repealed.

Mr. Brewin argued also that the lack of a medical certificate was not a valid ground to order the deportation of Petersen as he had not been asked or given the opportunity to be examined by a medical officer appointed by the Department at any stage during the Inquiry or before it; that he had no knowledge where or how he should apply and no opportunity was afforded him to get a medical certificate. Mr. Brewin contended that the ordinary principles of law and common sense must apply and a person such as Petersen, cannot be denied some right when he has not been given, by the person who can give him the opportunity, to acquire that which he is said not to have had. That is an injustice and an absurdity. In support of this portion of his argument, Mr. Brewin referred the Board to the case of Espaillet - Rodriguez (1964) S.C.R. 3 which was a case under the former Immigration Regulations in which two grounds were given for deportation: One was not having an immigrant visa and the other was not having a medical certificate. In his dissenting judgment, Mr. Justice Cartwright (as he then was) and who was the only judge to deal with the lack of a medical certificate said at page 18:

"Turning to s. 29 of the Regulations its purpose is similarly to prevent a would-be immigrant setting out for Canada if he falls within classes (a), (b), (c) or (s) of s. 5 of the Act and insofar as it contemplates a medical certificate obtained in the country whence the applicant came it also is, in my opinion, inapplicable to the case of a person who has for some time prior to making application for admission been lawfully present in Canada. This is not to say that the appellant does not have to obtain a medical certificate to establish that he does not fall within any of the classes mentioned. In the case before us there is uncontradicted sworn testimony that the applicant is in perfect health and that he asked to be informed to whom he could submit himself for an examination. To deny him this information and a reasonable time in which to obtain a certificate would, in my opinion, be to deny him the sort of hearing to which under the Act and the common law he was entitled."

The view that the provisions of ss. 28 and 29 of the Regulations deal with preliminary matters is strengthened by the wording of s. 30:

"The passing of any test or medical examination outside of Canada or the issue of a visa, letter of pre-examination or medical certificate as provided for in these Regulations is not conclusive of any matter that is relevant in determining the admissibility of any person to Canada."

For the above reasons it is my opinion that the Special Inquiry Officer erred in his interpretation and application of the Act and of the Regulations and that he should have proceeded to inquire and decide whether the appellant was in fact a member of any prohibited class and should have given the appellant an opportunity to obtain a medical certificate showing that he did not fall within any of the classes (a), (b), (c) and (s) of s. 5 of the Act. It follows from this that the deportation order which he made was not made in accordance with the provisions of the Act."

The other four judges relied upon the fact that the appellant, Espaillat-Rodriguez, did not have an immigrant visa as required by the Regulations and dismissed his appeal. They did not mention or discuss whether the lack of a medical certificate was or was not a valid ground on which to order deportation.

At the Inquiry, Petersen admitted he did not have a medical certificate as required by Section 29(1) of the Immigration Regulations, Part I. Section 34(3) although making specific reference to Section 28 of the said Regulations does not make any reference to Section 29. Nowhere in the evidence at the Inquiry or at the hearing of the appeal was evidence adduced to show the state of Petersen's health or that he had requested a medical examination by a Departmental medical officer. That being so and as the Immigration Regulations, Part I, require every immigrant to have such a medical certificate (Section 29(1)), it follows that he has not complied with the said regulation and therefore the lack of such medical certificate is a valid ground for deportation. It may well be that the Board would have come to a different conclusion on this point if the evidence had shown that Petersen had applied to the appropriate Immigration authorities for a medical examination and such examination had been refused.

Mr. Brewin argued that the assessment of "0" points given to Petersen under the heading of occupational demand by the Immigration officer when he assessed Petersen in accordance with the norms set out in Schedule "A" of the Immigration Regulations, Part I, was wrong. He argued that the Special Inquiry Officer misdirected himself at the Inquiry by considering only the occupational demand for the occupation of a machine operator -- actually the assessment was made on the basis of an apprentice machine operator -- which was not the occupation for which Petersen was qualified. According to Mr. Brewin, the assessment for occupational demand which Petersen should have been given should have been based upon the occupation he would likely follow when he got the opportunity and which occupation, in fact, Petersen did get and is now following. The Regulation, Section 32(2)(c), refers to the fact that if he was outside Canada he should be assessed on the basis of the demand in Canada of the occupation in which he is likely to be employed; it does not say in which he is employed when he first comes to Canada. There is all the difference in the world, Mr. Brewin argued, between taking a temporary occupation and assessing the appellant on that basis and stating there is no demand for him on that basis and therefore he does not get any points for occupational demand. The very crux of the case is whether the assessment for occupational demand is based on the occupation Petersen follows or the occupation he is likely to follow or will follow on a reasonable assessment of the probabilities.

Counsel for the Minister took the position that Petersen was not given any units of assessment for occupational demand because he was not qualified in the occupation he was following at the time of the Inquiry. The job that had been arranged for him was that of a learner or apprentice on a spinning machine and he had no experience or training at this type of work.

There can be no doubt that in accordance with Section 32(2)(c) of the Immigration Regulations, Part I, an independent applicant outside Canada, is to be assessed in respect of the demand in Canada for the occupation in which he is likely to be employed. However, an independent applicant, in Canada, who then comes within the ambit of Section 34(3)(f) of the Regulations is to be assessed

"as if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule "A", except with respect to arranged employment". The phrase "except with respect to arranged employment" clearly refers to and must be taken to mean employment of a definite nature in which the applicant is either engaged at the time he completes his application for permanent admission to Canada or satisfies the Immigration officer taking the application that he has, in fact, a definite promise of specific employment. In this case Petersen, in his application for permanent admission stated his employment was to be that of an apprentice machine operator and he was assessed in respect of the occupational demand for such an apprentice machine operator. This assessment, in my opinion, was made correctly and in accordance with Section 34(3)(f) of the Immigration Regulations, Part I. To require an Immigration officer to assess an applicant in Canada on the basis of the occupational demand which he would likely follow based on a reasonable assessment of probabilities would lead to the kind of situation whereby an applicant might well say he intended to follow some type of employment which, in fact, he had no intention of doing even if qualified to do simply in order to obtain a higher assessment. This would negate and render inoperative the phrase "except with respect to arranged employment" in Section 34(3)(f).

A point which has caused the Board some concern is whether the appellant should have been re-assessed immediately prior to the commencement of the Inquiry owing to the lapse of time between his assessment, on or about November 20, 1967 and the date of the Inquiry on January 8, 1968, having in mind that the Deportation Order speaks from its date of issue, January 8, and is not retroactive. Can it be said the appellant suffered any prejudice by the failure to make such a re-assessment? Such re-assessment by an Immigration officer would have to be made as if the appellant were outside Canada, except for arranged employment (Section 34(3)(f)). In this case the arranged employment at the time of the Inquiry was still the same as that set out in his application for permanent admission, namely that of an apprentice machine operator. It cannot be said therefore that by failing to make such a re-assessment Petersen suffered prejudice. On the other hand, if there had been a change in the arranged employment of the appellant between the time of his original assessment and the start of the Inquiry, and as the Special Inquiry Officer cannot substitute his opinion for that of the opinion of the assessing officer unless it can be shown that the assessing officer acted upon a wrong principle or that on the evidence the decision was manifestly wrong, which is not the present case, it would seem the proper course to be followed by the Special Inquiry Officer would be to adjourn the Inquiry in order to allow the appellant to amend his application for permanent admission to show the proposed new employment. A re-assessment could then be made by an Immigration officer and the Inquiry proceed.

Mr. Brewin called three witnesses in addition to the appellant in support of his argument that there exists reasonable grounds for the appellant to believe he will be punished for activities of a political character or will suffer unusual hardship and also that there exist compassionate or humanitarian considerations which in the opinion of the Board would warrant the granting of special relief in accordance with the provisions of Section 15(1)(b)(1) and (ii) of the Immigration Appeal Board Act.

Petersen in his evidence before the Board testified as follows:

"Q. If the deportation order is carried out, can you tell us from your own knowledge of any anticipation you have about punishment.

- A. The case has been reported on the South African broadcasting network.
- Q. What do you mean "the case"?
- A. Practically everything I said in Canada about apartheid and so forth and it has all been reported in the press in Capetown and there is a very good chance I might be imprisoned when I get to South Africa.
- Q. I take it you are not an expert in law but I take it you will be punished?
- A. That is right.
- Q. Could you be a little more explicit in regard to your advancement in your profession as a journalist; would there be restrictions there that might not apply to you in Canada?
- A. Careers as a newspaperman in South Africa are very limited because of the apartheid restrictions which are in force. A newspaperman cannot move freely and as a result you can only work for coloured papers which is only a handful and white papers, even though you are a good writer, they would not accept you full-time in their employ because they wouldn't be able to send you on any - well, they have to choose specifically the type of stories you write and you cannot write stories freely because oftentimes you have to attend functions of certain people and they have to leave you aside and send a white because a coloured would not be able to get into that particular place or circle."

Professor Arthur Keppel-Jones, Dean of History, Queen's University, testified that he was born in Capetown, South Africa, that he came to Canada eight and a half years ago and has a special interest in the development of race relations in South Africa. He stated he has kept in touch with the development of conditions in South Africa and that there is evidence that when people have done the sort of thing that the Appellant has done, that is, been abroad and criticized the regime, they are immediately subjected to various kinds of pressure when they come back. Professor Keppel-Jones referred to the well-known case of Alan Peyton who spoke in Toronto against the South African regime and on his return had his passport taken away. The Professor made reference to the provisions of the 180-day detention clause found in the General Law Amendment Act of 1965 which provides for the detention of 180 days, merely on the word of the Minister of Justice. No court can question the order with people so detained being kept in solitary confinement and that this detention is intended not for suspected criminals or persons designed for punishment but for witnesses. Petersen being a journalist "would of course be wide open to this treatment."

When asked by Mr. Brewin:

- "Q. If I may come on to the other part of this clause "or will suffer unusual hardship". Perhaps you have partially covered that but would you see any reasonable grounds for believing that Petersen might suffer unusual hardship?

- A. Well, I think the hardship that he would certainly suffer would be regarded as very considerable in Canada. It is very difficult for anyone in Canada to picture what is involved. It is the whole structure known under the general title of apartheid which involves segregation and restriction on the ground of race and colour in various respects."

Professor Charles Kishmul George Hahn of the Faculty of Engineering, University of Waterloo, who was born in South Africa and has been in Canada since 1962 read under oath a prepared Statement to the Board. In it he said:

"Under existing South African laws there is no doubt whatsoever in my mind that Petersen's appearance at this inquiry constitutes in the eyes of the South African government an act of nothing less than treason. For a non-white South African to plead for permission to remain in Canada and not be deported on humanitarian grounds simply compounds this treason."

He ended his statement as follows:

"Petersen has a good job, he has relations in Kitchener. His deportation would mean a sentence worse than death. He seeks your permission simply to remain in Canada as a responsible human being and a potential Canadian citizen. An opportunity that will give him, for the first time in his life, a chance to live as a dignified human being."

Mr. John Zaritsky, a news reporter on the Kitchener-Waterloo Record newspaper, gave evidence that there is a great demand for skilled newspapermen in Canada and that newspapers all over the country are looking for such skilled help. He testified further that he knew Petersen's qualifications and that there was no question but that he was liable to establish himself successfully in Canada.

Having heard the evidence the Board has no doubt that reasonable grounds exist for believing that Petersen will be punished for activities of a political character if execution of the deportation order is carried out. That being so, he comes squarely within the provisions of Section 15(1)(b)(1) of the Immigration Appeal Board Act.

It is difficult to determine whether Petersen would suffer "unusual hardship" if he should be returned to his own country. "Unusual" is defined in the Shorter Oxford Dictionary, 3rd edition, page 2316, as "Not often occurring or observed, different from what is usual; out of the common, remarkable, exceptional." It is of course common knowledge and the Board is entitled to take judicial notice of the doctrine of apartheid which prevails in South Africa. This doctrine imposes a mode of life circumscribed by restrictions and regulations on both the black and coloured population in that country in a manner with which most Canadians do not agree. Petersen has already told us in his evidence, to which reference has been made earlier, that in South Africa his opportunity to practise and advance in his chosen profession of journalist is severely restricted. In this, however, he is in no different situation from any other

coloured journalist. He would return to a life of limited working opportunities, and would live in an atmosphere of restraint and restriction. However there was no evidence adduced either at the Inquiry or Appeal hearing from which I am able to find that the Appellant will himself suffer unusual hardship, over and above that shared and suffered by all "coloureds" if he should be returned to South Africa.

The Board sympathizes with Petersen in his desire to establish himself in Canada where he can come and go as he pleases and practise his profession, according to his ability, without hindrance and without any restriction based on the fact he is coloured. It considers further that it would not be a humane act to order him returned to his own country where he would have to resume his life among the coloured population in an atmosphere of restraint and Petersen restriction and be liable to punishment for activities of a political character. Therefore the Board finds that Petersen is entitled to the granting of special relief under Section 15(1)(b)(ii) of the Immigration Appeal Board Act.

The evidence of Mr. John Zaritsky together with the letter from Raymond Stanton Publications, Exhibit A-1, at the Appeal hearing, show that should be able to progress satisfactorily if permitted to remain in Canada.

The Board therefore orders and directs that:

- (a) the appeal be and the same is hereby dismissed;
- (b) the deportation order be stayed pending a review of the said order on the day of April 8, 1968;
- (c) the appellant to report for a medical examination as instructed by the Department of Manpower and Immigration.

The Board requests the Department of Manpower and Immigration to arrange the medical examination of Petersen as soon as possible in accordance with the Immigration Act and Regulations and to report the result of such medical examination to the Board.

Counsel:

For the appellant: A. Brewin, Q.C.

For the respondent: T.H. Gill, Department of Manpower and Immigration

Samuel James QUARCINI, appellant et

Le Ministre de la Main-d'oeuvre et de l'immigration, intimé

Décision: March 26, 1968
(Dossier no: 67-5040)

Coram: J. Paul Geoffroy, Vice-président, A.B. Weselak, F. Glogowski

Ordonnance d'expulsion avant la mise en vigueur de la Loi sur la Commission d'appel de l'immigration - Procédure d'un pays étranger - Validité d'une seconde ordonnance d'expulsion - Loi sur l'immigration: Art. 5(d); 19(1)(e)(ix)-

Two orders of deportation - Coming into force of the Immigration Appeal Board Act - Validity of second order of deportation - Criminal procedure in a foreign country - Immigration Act: S. 5(d); 19(1)(e)(ix)-

Arrêt:- En 1961, une ordonnance d'expulsion fut émise contre l'appelant en vertu de l'article 5(d) parce qu'il avait été trouvé coupable d'un crime impliquant turpitude morale, dans l'état de New York. Subséquemment, l'appelant, en vertu d'une procédure américaine connue sous le nom de "coram nobis", réussit à faire annuler sa condamnation. En 1967, l'appelant fut expulsé de nouveau en vertu de l'article 19(1)(e)(ix). Lors de l'audition de l'appel contre cette ordonnance, des preuves furent données par des experts à la Commission quant à la procédure et aux résultats du "coram nobis". Nonobstant le fait que la condamnation sur laquelle la première ordonnance était basée n'existait plus, la Commission créée en 1967 n'avait pas le droit de réviser une ordonnance d'expulsion émise en 1961. Sa juridiction peut être exercée seulement en rapport avec l'ordonnance d'expulsion faite après la mise en vigueur de la Loi de la Commission d'appel de l'immigration. La deuxième ordonnance d'expulsion est valide puisqu'elle est fondée sur l'existence d'une ordonnance antérieure et l'appelant n'a pas obtenu le consentement du Ministre l'autorisant à revenir au Canada.

Held:- In 1961, appellant was ordered deported under Section 5(d) of the Immigration Act having been convicted in New York State for a crime involving moral turpitude. Subsequently, appellant, under an American procedure known as "coram nobis" succeeded in having the conviction annulled. In 1967 the appellant was again deported this time under Section 19(1)(e)(ix) of the Immigration Act. At the hearing of his appeal against this order, expert evidence was given before the Board as to the procedure and results of the "coram nobis". Notwithstanding the fact that the conviction on which the first order was based no longer existed, the Board, created in 1967, had no jurisdiction to review a deportation order made in 1961. Its jurisdiction may be exercised only in respect of the deportation order made after the coming into force of the Immigration Appeal Board Act. This second order was valid, since it was based on the existence of the proper order and the consent of the Minister for re-entry into Canada had not been obtained.

The judgment of the Board was delivered by:
Le jugement de la Commission fut rendu par:

J.-Paul Geoffroy

L'ordonnance d'expulsion se lit comme suit:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- and that

- 3) you are a person described in subparagraph (ix) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, having returned to Canada contrary to the provisions of Section 38 of the Immigration Act, in that after a deportation order was issued against you at Niagara Falls, Ontario, on June 8, 1961, your appeal against which was dismissed on June 20, 1961, you returned to Canada without the consent of the Minister."

Les faits dans cette affaire sont les suivants:

L'appelant est âgé de 45 ans, marié, et citoyen des Etats-Unis. Il est un spécialiste pour l'achat de bois qui doit être utilisé pour la fabrication de contre-plaqué de qualité. Dans l'exercice de son commerce, il lui arrive fréquemment de venir au Canada, surtout dans le sud de l'Ontario où il est bien connu de certaines entreprises forestières et des représentants de l'Etat provincial qui ont juridiction en ce domaine.

Le 8 juin 1961, monsieur Quarcini fut expulsé du Canada à Niagara Falls, Ontario, pour la raison qu'il avait été condamné pour un crime impliquant turpitude morale. Ce crime aurait été commis à Niagara Falls, Etat de New York, aux Etats-Unis, vers la fin du mois de décembre 1940. Il fut condamné au mois de juin 1941. Par la suite, pendant qu'il était en liberté sur parole, il s'est enrôlé dans l'armée américaine et y demeura jusqu'à la fin de la guerre alors qu'il fût honorablement licencié.

En dépit de l'existence de l'ordonnance d'expulsion émise en 1961 et, par suite de la réponse ambiguë qu'on lui fournit quant au résultat de l'appel de cette ordonnance, monsieur Quarcini vint au Canada en maintes occasions.

Le 24 novembre 1967, il fut à nouveau expulsé. Cette dernière ordonnance basée sur l'article 19(1)(e)(ix) est fondée sur le fait qu'une première ordonnance d'expulsion avait déjà été émise contre lui et qu'il tentait de revenir au Canada sans avoir au préalable obtenu le consentement du Ministre.

A l'audition de l'appel, la Commission a entendu comme témoin, Me Bernard Sax, avocat de Niagara Falls, N.Y., qui a représenté l'appelant dans une procédure appelée aux Etats-Unis "coram nobis". L'objet de cette procédure était d'obtenir l'annulation du plaidoyer de culpabilité de monsieur Quarcini lors de son procès du mois de juin, 1941. Ayant obtenu gain de cause, il lui fut possible d'obtenir un nouveau procès au cours duquel l'accusation contre monsieur Quarcini a été rejetée. Le témoignage de Me Sax est corroboré par une lettre du secrétaire du Procureur du comté de Niagara, N.Y.

L'appelant, en soumettant cette preuve, veut faire annuler la première ordonnance d'expulsion qui sert de base à la seconde. Il se plaint de n'avoir jamais pu, dans le passé, faire connaître aux autorités de l'immigration, soit lors de la première enquête en 1961, comme aussi à l'occasion de la seconde enquête en 1967, les faits ci-haut décrits susceptibles d'annuler la première ordonnance d'expulsion. Il allègue que la présente Commission, à cause des pouvoirs étendus dont elle dispose, est en mesure d'apporter un remède approprié à cette situation fausse et injuste.

Le répondant soutient que la Commission, qui est entrée en exercice le 13 novembre 1967, n'a pas compétence pour décider d'une ordonnance d'expulsion émise en 1961. Sa juridiction est limitée à l'ordonnance d'expulsion émise à la suite de la mise en vigueur de la Loi sur la Commission d'appel de l'immigration. Seule l'ordonnance rendue le 24 novembre 1967 peut être soumise à la considération de la Commission. Cette ordonnance d'expulsion est valide puisqu'elle est fondée sur l'existence d'une ordonnance antérieure et l'appelant n'a pas obtenu le consentement du Ministre l'autorisant à revenir au Canada.

La Commission, au cours de l'audition, a convenu qu'elle n'avait pas juridiction pour décider de la validité de la première Ordonnance d'expulsion pour les raisons mises de l'avant par le répondant. Cependant, aux fins de pouvoir exercer équitablement sa discrétion en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration, elle a permis à l'appelant de faire une preuve qui tendait à démontrer l'illégalité de la première ordonnance d'expulsion. Il semble évident que le fait sur lequel s'était basé l'officier spécial pour émettre l'ordonnance d'expulsion du 8 juin 1961, n'existe pas. Il a été bien établi devant la Commission que l'appelant a obtenu le retrait de son plaidoyer de culpabilité, et qu'au cours d'un nouveau procès, l'accusation qui avait été portée contre lui a été rejetée. La Commission, cependant, ne croit pas avoir la compétence requise pour annuler l'ordonnance. En conséquence, elle doit accepter comme valide la deuxième ordonnance d'expulsion du 24 novembre 1967 et rejeter l'appel.

Toutefois, en vertu des pouvoirs qui lui sont conférés par l'article 15(1)(b)(i)(ii), la Commission, étant convaincue que la preuve a été faite que l'appelant n'a jamais été condamné pour un crime impliquant turpitude morale, considère que, par suite de l'existence d'une ordonnance d'expulsion lui interdisant d'entrer au Canada et d'y poursuivre l'exercice d'un commerce légitime, l'appelant souffre de graves tribulations et, pour des raisons humanitaires, elle se croit justifiée de corriger cette situation.

La Commission décide d'annuler l'ordonnance d'expulsion rendue contre l'appelant le 24 novembre 1967, et ordonne qu'il soit accordé à l'appelant le droit d'entrer au Canada comme non-immigrant.

Procureurs:

Pour l'appelant: Me F.J. Murphy, avocat

Pour l'intimé: E. Thomas, c.r.

Anastassios GIOULEKAS, appellant and

The Minister of Manpower and Immigration, respondent (Decision: April 10, 1968
(file: 68-5119)

Coram: J. Scott, Chairman, A.B. Weselak, U. Benedetti

Appellate jurisdiction of the Board - Court of Record - Creature of Statute - Statute must be strictly construed - New evidence - Discretionary powers of the Board - Permanent resident - Assessment by Immigration officer - "In the opinion of ..." - Substitution of discretion - Immigration Act: S. 5(t) - Immigration Regulations: S. 34(3)(f); 28(1); 29(1); Schedule "A". 4 - Immigration Appeal Board Act: S. 7; 8; 11; 12; 13; 15-

Compétence d'appel de la Commission - Cour d'archives - Créée par une loi - La loi doit être interprétée rigoureusement. - Nouvelle preuve - Pouvoirs discrétionnaires de la Commission. - Résident permanent - Appréciation par un fonctionnaire à l'immigration - "De l'avis de" - Substitution de la discrétion - Loi sur l'immigration: Art. 5(t) - Règlements de l'immigration: Art. 34(3)(f); 28(1); 29(1); Annexe "A". 4 - Loi sur la Commission d'appel de l'immigration: Art. 7; 8; 11; 12; 13; 15.-

Held the appellate jurisdiction of the Board must be found in the statute and the statute must be strictly construed. -By statute the Board is a Court of Record - The Board is by statute limited in its discretion and can only consider such factors in arriving at its decision as outlined in the Immigration Appeal Board Act. -In the case of a permanent resident, the factors to be considered will cover a very wide range as the Board may exercise its discretionary powers having regard to all the circumstances of the case. In all other cases the factors to be considered are limited as outlined in the Act. - The Board is empowered to receive and consider new evidence. -"In the opinion of an Immigration Officer: Parliament has by apt words indicated that the exercise of any discretionary powers in reaching an opinion shall lie with the Immigration officer; it has not by apt words indicated that the exercise of the discretion itself shall be subject to judicial review. The crucial question here is in what circumstances and to what extent will this Board review the merits of the exercise of a statutory discretion which is made neither subject to appeal nor limited by express provision of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confined. In the opinion of the Board, considering the evidence before it, the appellant did not show that the Immigration officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. It therefore in the instant case declines to review the assessment and substitute its own opinion for that of the Immigration officer.

Arrêt: Pour déterminer la compétence d'appel de la Commission il faut recourir à la loi qui a créé la Commission et cette loi doit être interprétée rigoureusement.- La loi fait de la Commission une cour d'archives.- La loi délimite la discrétion de la Commission qui, pour en arriver à un jugement, ne doit considérer que les éléments énoncés dans la Loi.- Dans le cas d'un résident permanent, la Commission aura grande latitude puisqu'elle peut exercer sa discrétion en tenant compte de toutes les circonstances pertinentes. Dans tous les autres cas, la Commission doit s'en tenir aux éléments énoncés dans la loi. La Commission a le pouvoir d'accueillir une nouvelle preuve. "De l'avis de": en des termes appropriés, le Parlement a investi le fonctionnaire à l'immigration de tous les pouvoirs discrétionnaires pour en arriver à l'expression d'un avis; mais le Parlement n'a pas dit spécifiquement que l'exercice même de ces pouvoirs

discrétionnaires pouvait être sujet d'un examen par les tribunaux. Le problème critique, ici, est de poser en quelles circonstances et dans quelle limite, la Commission peut-elle examiner l'exercice de pouvoirs discrétionnaires dont il n'y a pas appel et qui n'est pas expressément limités par la Loi? - Les tribunaux ont constamment maintenu qu'ils ne sauraient substituer leur discrétion à celle dont est investie une autre compétence. Vu la preuve, la Commission est d'avis que l'appelant n'a pas démontré que le fonctionnaire à l'immigration s'était appuyé sur un principe faux ou qu'il en était venu à une conclusion évidemment erronée. Dans cette affaire la Commission décline donc de reviser l'appréciation du fonctionnaire à l'immigration et de substituer sa propre opinion à la sienne.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

A.B. Weselak:-

The deportation order reads:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile and that;
- 3) you are a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Regulations by reason of the fact that:
 - (i) you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, except with respect to prearranged employment;
 - (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations;
 - (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations."

Counsel for the appellant, on being advised that certain submissions could not be entertained by the Board asked what was the appellate jurisdiction of the Immigration Appeal Board?

The Board is a creature of Statute. Having been created by the passage in Parliament of the Immigration Appeal Board Act, C.A.P.9 R.S.C. 1966-67. Sections 7 and 8 of the Act declare:

- "7.(1) The Board is a court of record and shall have an official seal, which shall be judicially noticed.

- (2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may
 - (a) issue a summons to any person requiring him to appear at the time and place mentioned therein to testify to all matters within his knowledge relative to a subject matter before the Board and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to such subject matter;
 - (b) administer oaths and examine any person upon oath, affirmation or otherwise; and
 - (c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it.
- (3) The Board may, and at the request of either of the parties to the appeal shall give reasons for its disposition of the appeal.

"8.(1) The Board may, subject to the approval of the Governor in Council, make rules not inconsistent with this Act governing the activities of the Board and the practice and procedure in relation to appeals to the Board under this Act.

- (2) No rule made pursuant to subsection (1) has effect until it has been published in the Canada Gazette.

In C.N.R. v Lewis (1930) Ex C.R. 145, Audette J., stated:

"Statutory provisions giving jurisdiction must be strictly construed and that is especially true when the statute confers jurisdiction upon a tribunal, like the Exchequer Court, of limited authority and statutory origin, and in such a case a jurisdiction cannot be said to be implied. A Court must not usurp a jurisdiction with which it is not clearly legally invested; but must keep within the limits of its statutory authority; and should not exercise powers beyond the scope of the Act giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act."

A Court of Record is defined in Dixon v McKay (1903) 21 M.R. 762, by Richards J., as:

"In Stephen's Commentaries, vol. 3, p. 272, a Court of Record is defined as: 'One whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the records of the Court, and are of such high and supereminent authority that their truth is not to be called in question ... For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea or even proof

be admitted to the contrary. And, if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no'."

And in Re Winnipeg Charter; In Re Sisters of the Holy Name of Jesus and Mary (1922) 2 W.W.R. 253 as abridged in the Canadian Abridgment, Vol. 14, p. 29, it is stated:

"In the sense at least that the Board of Valuation and Revision constituted under s. 277 of the Winnipeg Charter is a tribunal which must under the provisions of the charter governing its duties keep a record of its proceedings it is a court of record, and, therefore, all the grounds upon which a decision given by it was reached ought to be found among its records. Per Dysart, J., "The appeals to the Board must be brought upon a certain form of pleadings in writing. The Board is to sit after due and prescribed notice to the public; its sessions must be public; all evidence before it must be given under oath and recorded in writing; witnesses may appear and testify; any member of the Board may administer the oath; unwilling witnesses may be compelled to attend; the assessment roll may be examined but the assessors are required to be present to support the roll if they so desire. If these provisions do not make the Board a Court of Record, then it is hard to conceive that our County Court is a Court of Record."

Other characteristics of a Court of Record are described in Kowanko v J.H. Tremblay Co., (1920) 1 W.W.R. 481, Canadian Abridgment, Vol. 14, p. 25:

"The Board is not declared to be a Court. It has no seal as is usual in the case of Courts. Its orders are not enforceable until registered in the King's Bench. They are not given by the Act the power of enforcement such as ordinarily exists to compel obedience to a Court order. There is given no power to commit for contempt. The provisions of the Act, taken as a whole, do not contemplate a litigation between parties but rather an adjustment of claims by the Board against a fund. There also exist under the Act what may be called positive attributes which are inconsistent with the idea of the Board being a Court. It is a body corporate and is given the right to bring an action and to take proceedings before magistrates. It is given the power to inspect premises and direct alterations to be made thereon and other powers at variance with those usually exercised by Courts. These and other characteristics apparent on perusal of the Act are in opposition to the contention that this Board is a Court."

The appellate jurisdiction of the Board must be found in the statute and the statute must be strictly construed. In the instant case the jurisdiction is to be found in Sections 11 to 15 inclusive of the Act which read as follows:

- "11. A person against whom an order of deportation has been made under the provisions of the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact.
12. The Minister may appeal to the Board on any ground of appeal that involves a question of law or fact, or mixed law and fact from a

decision by a Special Inquiry Officer that a person in respect of whom a hearing has been held is not within a prohibited class or is not subject to deportation.

13. The Board may order a hearing reopened before the Special Inquiry Officer who presided at the hearing or before some other Special Inquiry Officer for the receiving of any additional evidence or testimony, and the Special Inquiry Officer who presides at the reopened hearing shall file a copy of the minutes of the reopened hearing, together with his assessment of such additional evidence or testimony, with the Board for its consideration in disposing of the appeal.
14. The Board may dispose of an appeal under section 11 or section 12 by
 - (a) allowing it;
 - (b) dismissing it; or
 - (c) rendering the decision and making the order that the Special Inquiry Officer who presided at the hearing should have rendered and made.
15. (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
 - (a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case, or
 - (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,
 the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made.
 - (2) Where, pursuant to subsection (1), the Board directs that execution of an order of deportation be stayed, it shall allow the person concerned to come into or remain in Canada under such terms and conditions as it may prescribe and shall review the case from time to time as it considers necessary or advisable.
 - (3) The Board may at any time
 - (a) amend the terms and conditions prescribed under subsection (2) or impose new terms and conditions; or
 - (b) cancel its direction staying the execution of an order of deportation and direct that the order be executed as soon as practicable.

- (4) Where the execution of an order of deportation
- (a) has been stayed pursuant to paragraph (a) of subsection (1), the Board may at any time thereafter quash the order; or
 - (b) has been stayed pursuant to paragraph (b) of subsection (1), the Board may at any time thereafter quash the order and direct the grant of entry or landing to the person against whom the order was made."

Section 11 provides for an appeal to the Board against an order of deportation on law or fact or mixed law and fact which "has been made under the provisions of the Immigration Act". The Board here is restricted in its inquiry to examining the deportation order, the evidence upon which it is based, whether it was made in accordance with the provisions of the Immigration Act and Rules thereunder. If the evidence is such that will support the order, and the order has been made in accordance with the Act and Rules, then the Board has no alternative but to dismiss the appeal under Section 14. The Board here has no discretionary powers but must base its decision on the evidence and the law which is before it.

Under Section 15 of the Immigration Appeal Board Act, the Board is given certain discretionary powers, which when taken into consideration, it is given the power to "direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made. Where, pursuant to subsection (1), the Board directs that execution of an order of deportation be stayed, it shall allow the person concerned to come into or remain in Canada under such terms and conditions as it may prescribe and shall review the case from time to time as it considers necessary or advisable."

The Board, however, is by statute limited in its discretion and can only consider such factors in arriving at its decision as are outlined in the Act

In the case of a permanent resident, the matters to be considered will cover a very wide range as the Board may exercise its discretionary powers "having regard to all the circumstances of the case."

In all other cases the matters to be considered by the Board are circumscribed by the Act and are limited to determining whether reasonable grounds exist for believing that if the deportation order is carried out "the person concerned will be punished for activities of a political character or will suffer unusual hardship" and also whether there exist compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief.

The Supreme Court of Canada on appeal, in considering the material for decision, will not receive new evidence.

In Montreal v Hogan (1900) 3. S.C.R.

"Per Taschereau J., for the Court: ... it has been the constant jurisprudence of this court not to receive here any new evidence whatever."

In Red Mountain Ry v Blue (1907) 39 S.C.R. 390

"Per Fitzpatrick, C.J.: The jurisprudence of the court is well settled by a long line of decisions that an appeal to the Supreme Court must be decided solely upon the evidence contained in the case certified to the registrar by the clerk of the court appealed from."

And in Vol. 14, Canadian Abridgment, at p. 346:

"At the beginning of the argument appellants applied to have an affidavit added to the case. Per Ritchie, C.J.,: The case has been settled and you cannot now amend it by adding what would be equivalent to new evidence."

Confederation Life Assn. v O'Donnell, (1882) 10 S.C.R. 92.

However, the Board, unlike the Supreme Court of Canada, in the Immigration Appeal Board Act is expressly empowered to receive and consider new evidence. Section 7(c) of the Act provides:

"7.(c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it."

Counsel for the appellant did not directly challenge the validity of the order but the Board finds in submissions by Counsel for the appellant that certain argument could be construed as questioning the validity of the order, and therefore will deal with the order in detail.

As to the first two grounds, the appellant admits on Page 3 of the Minutes of Inquiry that he is a citizen of Greece and not a Canadian citizen. He also admits on Page 3 that he has never been admitted to Canada for permanent residence, it follows therefore that he could not have acquired Canadian domicile.

The third ground in the order, being in a prohibited class described under 5(t) of the Immigration Act, is based on three factors, the first of which is that he would not have been admitted to Canada as a permanent resident, if he had been examined outside of Canada as an independent applicant in accordance with the norms set out in Schedule "A", as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, except with respect to pre-arranged employment.

The assessment under Section 34 of the regulations was made by Immigration Officer J.F. Dinsmore. The assessment given to the appellant was as follows:

| | |
|---------------------------------|-------------------------|
| (i) Education and training | 9 out of a possible 20 |
| (ii) Personal assessment | 8 out of a possible 15 |
| (iii) Occupational demand | 5 out of a possible 15 |
| (iv) Occupational skill | 3 out of a possible 10 |
| (v) Age | 10 out of a possible 10 |
| (vi) Language assessment | 0 out of a possible 10 |
| (vii) Relative | 5 out of a possible 5 |
| (viii) Employment opportunities | 5 out of a possible 5 |
| TOTAL | <u>45</u> |

Counsel for the appellant argued that the Board has the power to review this assessment and if necessary the power to revise it. The Board is of the opinion that it has not the power to go behind the assessment to determine whether the appellant was properly assessed by the Immigration Officer.

In Petersen v Minister of Manpower and Immigration, Campbell, J.C.A., Vice-Chairman, stated:

"The Special Inquiry Officer cannot substitute his opinion for that of the opinion of the assessing officer unless it can be shown that the assessing officer acted upon a wrong principle or that on the evidence the decision was manifestly wrong."

Section 34 of the Immigration Act reads in Part:

34.(1) "In this section 'applicant in Canada' means a person who has been allowed to enter and remain in Canada as a non-immigrant under subsection (1) of section 7 of the Act other than"

The Act then lists classes of persons to whom this section does not apply and then the section goes on to provide "may be admitted to Canada for permanent residence if

(f) in the opinion of an immigration officer he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule "A" except with respect to arranged employment".

Schedule "A" relates to Independent Applicants; paragraph 4 provides:

"4. An applicant in Canada described in subsection (1) of section 34, must achieve at least fifty units of assessment on the factors set out in this Schedule other than arranged employment."

The Board notes that the section reads "In the opinion of an Immigration officer". Parliament has by apt words indicated that the exercise of any discretionary powers in reaching an opinion shall lie with the Immigration officer; it has not by apt words indicated that the exercise of the discretion itself shall be subject to judicial views.

The crucial question here is, in what circumstances and to what extent will this Board review the merits of the exercise of a statutory discretion which is made neither subject to appeal nor limited by express provision of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confined. There are many matters which the Courts of Appeal are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful, they often accept the decision of the authority in which the discretion is confined simply because they are themselves ill equipped to weigh the merits of one solution, a practical question as against another.

In Dom. Trust Co. v N.Y. Life Ins. Co., (1918) 3 W.W.R. 850, a statement of Lord Dunedin quoting Lord Halsbury in Montgomerie & Co. v Wallace-James (1904) A.C. 73, where Lord Halsbury stated.

"Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court."

And in Ruddy v Toronto Eastern Ry., 38 O.L.R. 556, Lord Buckmaster stated:

"Upon questions of fact an appeal Court will not interfere with the decision of the judge who has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence - unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

The appellant was not present at the hearing and his counsel did not, in the opinion of the Board, considering the evidence before it, show that the Immigration Officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. It therefore in the instant case declines to review the assessment and substitute its own opinion for that of the Immigration Officer.

The Board therefore finds that Paragraph 1 of the third ground in the order is valid and legal.

As to paragraph (ii) of the third ground in the order, the Minutes of Inquiry disclose that the appellant at Malton, Ontario, was granted on October 13, 1967, a non-immigrant visa to November 13, 1967, and this had not been extended, therefore this ground in the order is valid.

Paragraph (iii) of the third ground in the order is valid. On Page 8 of the Minutes of Inquiry the appellant admitted that his passport did not bear a medical certificate duly signed by a Medical officer.

The Board therefore finds that the grounds in the order are valid grounds for deportation and that the Deportation Order was made in accordance with the provisions of the Immigration Act and Regulations and therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act. Having dismissed the appeal on legal grounds under Section 14 of the Immigration Appeal Board Act, the Board now considers the appeal under Section 15 of the Act.

The appellant was not a landed immigrant, i.e. admitted for permanent residence, and as a result the exercise of the Board's discretion has been limited by Parliament to the considerations set out in Sections 15(b)(i) and 15(b)(ii) which read as follows:

"15 (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

- (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
- (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief."

The only evidence, in the instant case, which the Board can properly consider, is the evidence adduced at the inquiry. As the appellant chose not to be present at the hearing the Board did not receive any further evidence. Submissions by Counsel, unless under oath or if documentary and verified by affidavit or otherwise acceptable as evidence, are not evidence upon which the Board can act. Therefore the Board in this case must rely on the record and the only evidence in the record are the minutes of Inquiry.

The Board has carefully examined this evidence and finds that there is absolutely no evidence to support counsel's for the appellant submission that the appellant will be subject to persecution upon his return to Greece.

The appellant has not said so. He lived under the present regime in Greece for several months, he or his family were not persecuted by them during this time, and there is no evidence to indicate that upon his return he will be persecuted for any reason whatsoever, let alone for activities of a political nature. The appellant does not appear to be a person of such prominence as to be subject to the constant surveillance of the regime.

Neither was any evidence adduced that he would suffer undue hardship were he was to be deported. He and his family have lived under the Greek economy, he is accustomed to it and no undue hardship will follow if he is returned to his native country.

As to compassionate and humanitarian considerations the appellant's family is in Greece, he has no really close relatives here, he has established no roots here, the uprooting of which would cause him great distress, and there is no evidence on the record to support such a consideration.

It is true that economically the appellant may not be as well off in Greece as he may be in Canada but the Board feels that this alone is not sufficient reason to condone circumventing our immigration regulations regarding admission.

In conclusion while Parliament has passed legislation permitting a non-immigrant to apply for permanent residence as "an applicant in Canada" it would appear that it did not intend to permit all non-immigrants to remain as permanent residents in Canada. The immigrants are still subject to the same screening on medical and other grounds and to personal assessment as they are when they apply overseas. It therefore behooves a person seeking admission in this manner to at least inquire at an overseas immigration office to determine whether he is admissible as such.

If weight were given to the basic reason for this appeal, it would in effect, make it possible for every immigrant seeking admission as a visitor to create a basis for immunity to deportation merely by extending the period of stay beyond that usually involved in a visit, without more this does not suffice to support an application for special relief.

The Board therefore is of the opinion that there is not sufficient evidence before it which warrants it to exercise its discretion to grant special relief in this case and directs that the Deportation Order be carried out as soon as practicable.

Counsel:

For appellant: Ralph Cowan, Esq.,

For respondent: J.T. Pasman, Department of Manpower and Immigration

Femi Ishola AINA, appellant, and

The Minister of Manpower and Immigration, Respondent

Decision: May 29, 1968
(File no: 68-5258)

Coram: A.B. Weselak, F. Glogowski, G. Legaré

Non compliance with Section 26 Immigration Act - Inquiry held pursuant to an unsigned telex request from the Assistant Director in Ottawa. - Immigration Act: S. 2(e); - The Interpretation Act: R.S.C. Chap. 7, 1967. S. 23(3)(4). - Authorities and Jurisprudence -

Non observance de l'article 26 de la Loi sur l'immigration - Entrevue tenue à la requête, communiquée par telex et non signée par le directeur-adjoint à Ottawa. - Loi sur l'immigration: Art. 2(e). - Loi d'interprétation, SCR Chap. 7, 1967. Art. 23(3)(4). - Doctrine et jurisprudence.

Held:

- 1) judicial notice is taken of the fact that in the Government service the Assistant Director is to act for the Director in his absence or immobility to act;
- 2) the Immigration Act contains no direction as to how and with what formality the Director shall cause an inquiry to be held;
- 3) sufficient evidence has been given to prove the authority of the telex message.

The order of deportation is valid.

Arrêt:

- 1) connaissance judiciaire du fait que dans la fonction publique, le directeur-adjoint agit pour le compte du directeur quand celui-ci est absent ou empêché d'agir;
- 2) la Loi sur l'immigration ne prescrit pas comment ni quel formalisme le Directeur doit faire tenir un enquête;
- 3) preuve suffisante a été donnée de qui était l'auteur du message par télex. - l'ordonnance d'expulsion est valide. -

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

A.B. Weselak

The order of deportation reads:

- "1) you are not a canadian citizen;
- 2) you are not a person having acquired Canadian domicile; and that
- 3) you are a person described under subparagraph (ii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you have been convicted of an offence under the Criminal Code;
- 4) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

Counsel for the appellant challenged the validity of the order on the ground that the Telex message filed as Exhibit "A" to the Inquiry which reads as follows

"IMM MTL

MANPR IMM OTT

YOUR M 1-387 TELEX REPORT UNDER SECTION 19(1)(E)(11) AND (V1) OF THE IMMIGRATION ACT CONCERNING FEMI ISHOLA AINA, A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE, WHO HAS BEEN CONVICTED OF AN OFFENCE UNDER THE CRIMINAL CODE AND WHO ENTERED CANADA AS A NON-IMMIGRANT AND REMAINS THEREIN AFTER CEASING TO BE A NON-IMMIGRANT OR TO BE IN THE PARTICULAR CLASS IN WHICH HE WAS ADMITTED AS NON-IMMIGRANT: PURSUANT TO SECTION 26 OF THE IMMIGRATION ACT, I DIRECT THAT AN INQUIRY BE HELD."

was not compliance with Section 26 of the Immigration Act which provides

"26. Subject to any order or direction by the Minister, the Director shall, upon receiving a written report under Section 19 and where he considers that an inquiry is warranted, cause an inquiry to be held concerning the person respecting whom the report was made."

in that firstly it did not bear the signature of the director and that it was not certified as being a true copy of the original and that as a result thereof the Special Inquiry Officer had no jurisdiction to hold the Inquiry.

With regard to the first objection Section 2(e) of the Immigration Act provides:

"2(e) 'Director' means the Director of the Immigration Branch of the Department of Manpower and Immigration or a person authorized by the Minister to act for the Director."

Section 23, subsections (3) and (4) of the Interpretation Act, Chapter 7 R.S.C. 1967 provides:

"23(3) Words directing or empowering any other public officer to do any act or thing, or otherwise applying to him by his name of office, include his successors in the office and his or their deputy.

(4) Where a power is conferred or a duty imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office."

The Board is prepared to take judicial notice of the fact that in the Government service the Assistant Director is to act for the Director in his absence or immobility to act and considering the sections of the Immigration Act and the Interpretation Act the Board finds that the Assistant Director can "cause an Inquiry to be held" under Section 26 of the Act.

Section 19(1)(e)(ii) of the Immigration Act provides.

"19(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning
(e) any person, other than a Canadian citizen
or a person with Canadian domicile, who
(ii) has been convicted of an offence
under the Criminal Code."

A report under Section 19 was received by the Director and considered in the office of the Director. The telex message hereinbefore quoted was then issued by the Assistant Director J.L. Manion in which he states in part "I direct that an Inquiry be held".

As to the telex not having the signature or initials of the Assistant Director and therefore being "a non descript scrap of paper" insufficient to vest jurisdiction in the Special Inquiry Officer to hold the Inquiry, the Board notes at the outset that Section 26 of the Immigration Act contains no direction as to how and with what formality the Director shall "cause" an Inquiry to be held.

In Volume 32 Corpus Juris Secundum, Article 706 under the heading "Authentication" it is stated at page 978 et seq.

a. In General

A letter or telegram alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown.

"In accordance with the general rule as to the necessity of showing the execution or authenticity of a writing before it may be admitted in evidence, and the limitations and exemptions thereto, discussed infra 733 et seq., a letter alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown. There must be sufficient proof that the letter was written by the person by whom it purports and is claimed to have been written, or under the authority of the person claimed to have authorized it."

"Proof of the genuineness of the signature is sufficient authentication to warrant the admission of the letter. The genuineness of a letter or of the signature thereto may be sufficiently established by proof of the handwriting; but, when this is not possible, other evidence may be resorted to for this purpose. Thus a letter not in the handwriting of the alleged sender, or not shown to be in his handwriting, may itself furnish internal evidence of the source from which it came, as for instance the fact that it relates to matters which are known only to the alleged sender, although it has been said that internal evidence alone is not sufficient authentication."

"A telegram, like a letter, is not admissible in the absence of proof to its authenticity either by proof of the handwriting, where the original message is offered, or by other evidence of its genuineness; and where the admission of the telegram depends on the authority given to the actual sender by another person, such authority must be shown."

If a letter or telegram has been admitted on a promise to show authority of the writer, it should be stricken where such authority is not shown."

"Sufficiency of proof - It is not necessary that it should be proved beyond a reasonable doubt that the letter or telegram is that of the alleged author, but evidence which, if uncontradicted, would satisfy a reasonable mind of that fact is sufficient to authorize the admission of the communication. Whether a sufficient foundation has been laid for the admission of the evidence is a matter addressed to the discretion of the trial court, although the final question of its genuineness, assuming a sufficient foundation has been laid, is for the jury."

and at pages 984 and 985

"In order to render a letter or telegram or a copy thereof admissible against the addressee, it must be shown that it was received by him, or duly sent or delivered for transmission to him through the mails so as to raise the presumption, considered supra 136, that it was received by him, or that in some manner it was brought or came to his attention. Similarly a letter addressed to one other than the party sought to be charged with knowledge of its contents cannot be admitted without sufficient proof that the contents were communicated to him."

In Volume 22 of the "The English and Empire Digest, Article 4001,
page 372

Telegraphic messages are admissible evidence. Meeson v Oliver (1854), 23 L.T.O.S. 271, N.P."

and in Article 4002

"A telegram will be admitted as evidence, although not signed. Coventry Case, Ince's Case (1869), 20 L.T. 405, 421; 1 O'M. & H. 97, 104."

and in Volume 18 Canadian Abridgment at page 708

"Proof of Telegrams - Statutory Provision for Secondary Evidence.

Per Barry, J., (in a dissenting judgment): The originals of certain cablegrams would be the written messages handed in to the telegraph office at the sending point, and not the written copies delivered to recipients. The originals must be produced from the sending office, or else proof of their destruction given before the copies will be admissible. Phipson on Evidence, 4th ed., 497; Henkel v Pape, L.R. 6 Ex. 7, 40 L.J. Ex. 15, 8 Mews 1068, referred to. To remedy the inconvenience, which must often arise, of producing the original telegram, the New Brunswick legislature has made special provisions for giving secondary evidence of it, under ss. 35, 36 and 37 of The Evidence Act, C.S.N.B. 1903, c. 127.

Jones v Burgess, (1914) 43 N.B.R. 126 (C.A.). Varied by Supreme Court of Canada, Mar. 3, 1916 (unreported)."

In this case the Board finds that the telegram was sent by the Assistant Director and related to matters which were only known to the Assistant Director. It was duly sent and delivered by him for transmission and the evidence discloses that it was received by the Special Inquiry Officer in the usual course of events relating to such matters. It was acted upon in good faith as a genuine direction.

Section 7(c) of the Immigration Appeal Board Act provides:

"7(c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it."

Considering the foregoing authorities and the evidence on record the Board finds that the telex message filed as Exhibit "A" is admissible in evidence and it considers it as credible and trustworthy evidence of the existence of a direction by the Assistant Director, and that it is sufficient to "cause an Inquiry to be held" under Section 26 of the Immigration Act.

The appellant was born in Nigeria on the 12th day of November 1938. His father and one brother are in Nigeria. He arrived in Canada on September 11, 1962 and was granted a non-immigrant student visa, renewable annually. He renewed his visa in 1964 and received a Bachelor of Science degree on October 6, 1966, majoring in Mathematics and Physics. He had applied for extension of his visa in 1965 but the visa was withheld because of his conviction on 8th January 1965 of simple assault for which he received a two-year suspended sentence and which was being investigated by the Immigration authorities. At that time and in 1966 he was told to report after he had finished his examinations. On July 8, 1966 the appellant was interviewed by an Immigration officer and at the end of the interview he states he was left with the impression that he would later receive a letter from the Immigration Department. No such letter was forthcoming and he did not report. Apparently a letter was sent on August 26, 1966 but the appellant denies ever receiving this letter.

The appellant married on June 18th, 1966, an applicant for landing, citizen of Haiti, who had arrived in Canada in the month of June 1965. The appellant's wife has been granted permission to work and has been employed as a teacher in a Catholic school at Montreal at an annual salary of \$5,800.00. There are no children of this marriage.

The appellant is presently furthering his education at McGill University taking a course in Management. He is also employed by Steinbergs, training in Computer Analysis at \$120.00 per week.

Although the appellant denied committing the offence which led to his conviction, he nevertheless pleaded guilty and a record of the conviction is attached to the proceedings of the Inquiry.

The Board therefore finds that the ground in the Deportation Order is valid and that the order is made in accordance with the Immigration Act and Regulations thereunder.

The appeal is therefore dismissed under Section 14 of the Immigration Appeal Board Act.

Having dismissed the appeal under Section 14 of the Immigration Appeal Board Act the Board considered this appeal under Section 15(b) of the Immigration Appeal Board Act which provides.

"15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that

(b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

(i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or

(ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The Board has carefully considered the evidence relating to the offence and conviction under the Criminal Code and has reached the conclusion that the offence was not of such a criminal nature as to preclude it from considering exercising its consideration under Section 15 of the Immigration Appeal Board Act.

There was no evidence produced before the Board that the appellant would be punished for activities of a political nature.

The appellant has been in Canada for a period of six years and his wife for a period of three years. They have made progress and adapted themselves well in this country. They have now established roots here.

At page 4 (evidence taken at the hearing before the Board) the following appears:

"Q. If you are deported, to what country will you return?

A. If deported, number 1, to my country. I do not know if the members are aware of what is going on in Nigeria of which I am completely against this war.

Q. Are the skills that you acquired in Canada skills which you could use in your native country?

A. Yes

Q. There are facilities for those skills in Nigeria?

A. No, not so much in the field I am now on - computers - there is not."

and at page 5

"Q. If deported, would you be punished for political activities?

A. That I can't say. Right from the beginning of the war I have made my views known to our association that I am against the fighting there, that I thought it should be settled. I am aware of the fact some of our members have communicated these feelings to our Embassy and if returned I may be questioned or have pressure put on me. I have not the freedom of expressing idea the way I really want to.

Q. You said that there were not facilities in Nigeria?

A. Not, as you know, in computers. Nigeria has not developed so fast as the Western countries. I think they are going into the second generation.

Q. You could be placed there? Are opportunities there?

A. Not with the training I have here. I may be placed in some job below and not able to make use of the training I had here. Computers are going fast and they have a job for me in the second generation. I wouldn't be ahead.

Q. When planning your studies, did you plan with an effort to return or stay in Canada?

A. Since a year after I came here I decided, in 1963, I would stay here.

Q. Then you planned your school programme?

A. Yes."

The appellant's wife was not included in the deportation order. The Board considering the evidence as a whole is of the opinion that it would be an unusual hardship to deport the appellant to his native country where facilities are not available to utilize the talents and skills he has acquired in Canada. It is true that his readmission could be sponsored by his wife as the appellant would appear to qualify under our selection criteria. Considering all the circumstances the Board believes it would be inhumane to force the appellant to terminate his employment, separate him from his wife and incur the expense involved to return to Canada.

The Board therefore directs that the order be stayed Sine Die with a request to the Immigration Department to complete the processing of the appellant and his wife as immigrants and report the results of such examination to the Board.

Pursuant to this stay and request the Board received on January 31st, 1969, a report from the Immigration Department which reads as follows:

Re: Appeal of Femi Ishola AINA
IAB file 68-5258.

The Immigration Appeal Board dismissed this appeal and directed that deportation be stayed under certain conditions. It has now been establish that the Appellant(s):

(and wife) has complied with immigrant medical requirements;

background inquiries have failed to reveal any adverse information;

achieved fifty-nine units of assessment as an Independent Applicant/Nominated Relative;

on the basis of information available, has abided by the conditions laid down by the Board.

The respondent will not make any further submissions in this case.

Yours sincerely,

(Sgd.) D.E. Bandy,
Appeals Officer, Enforcement,
Home Services Branch,
Canada Immigration Division."

On March 5th, 1969 the Board was convened and reviewed this case.

In view of the fact that as a result of the examination requested, both the appellant and his wife were found to be admissible as immigrants (except for the conviction) the Board ordered that the Deportation Order made against the appellant on the 8th day of March A.D. 1968 be quashed and directed the grant of landing. On review the panel consisted of Mr. J.C.A. Campbell, Vice-Chairman and Messrs. A.B. Weselak and F. Glogowski.

Counsel:

For the appellant: E. Michael Berger, Q.C.

For the respondent: G.T. Trotman, Barrister and Solicitor

Fung CHAN)
 Kam Cheong WU) applicants and
 Wai Leung FUNG)

The minister of Manpower and Immigration, Respondent

MOTIONS

Decision: June 28, 1968
 (File no: 68-5105, 68-5106,
 68-5107)

Coram: J.V. Scott, Chairman, G.Legaré, F.Glogowski

New evidence - Introduced after disposition of the appeal - Jurisdiction of the Board - The Board, a superior court of record - Criteria for the testing of new evidence - Immigration Appeal Board Act: S.7(2)(c); 15(3)(4) - Immigration Appeal Board Rules S.17(c) - Quebec Code of Civil Procedure: S.483 - Authorities and Jurisprudence -

Nouvelle preuve - Présentation après disposition d'un appel. - Compétence de la Commission - La Commission, une cour supérieure d'archives, - Critères pour apprécier une nouvelle preuve - Loi sur la Commission d'appel de l'immigration: Art. 7(2)(c); 15(3)(4) - Règles de la Commission d'appel de l'immigration: Art. 17(c) - Code de procédure civile du Québec: Art. 483 - Doctrine et jurisprudence -

Held: Clearly, where execution of a deportation order has been stayed by the Board, additional evidence could be received and considered in respect of the powers given to the Board by subsection (3)(4) of S. 15 of the Immigration Appeal Board Act. However, nothing in S. 15 gives the Board jurisdiction to receive and consider additional evidence where a decision has been rendered dismissing an appeal and ordering that the deportation order be executed as soon as practicable.

Section 17(c) of the Immigration Appeal Board Rules is of no help to an appellant who is seeking to introduce new evidence after the disposition of the appeal.

Since the Immigration Appeal Board Act is silent as to the power of the Board to receive new evidence after an appeal is disposed of, it is necessary to turn to analogous situations prevailing in respect of other judicial and quasi-judicial bodies.

The Board, as a superior court of record, sees no reason to depart from the general rule prevailing in sister courts. It will, therefore, grant a motion to set aside a final disposition of an appeal and for the receipt of new evidence after such disposition only where:

1. the party seeking to introduce such evidence proves to the satisfaction of the Board that he could not have obtained such evidence by reasonable diligence before the original hearing of the appeal, and

2. the evidence sought to be so introduced is of such a nature that, if satisfactorily proved, it would furnish a sufficient reason for reconsideration of the Board's original disposition of the appeal.

Motions denied.-

Arrêt:- Lorsque la Commission a décrété le sursis d'une ordonnance d'expulsion il est bien clair qu'elle peut, en vertu des pouvoirs qui lui sont conférés à l'article 15(3)(4) de la Loi sur la Commission d'appel de l'immigration, accueillir et examiner une preuve nouvelle. Cependant rien dans l'article 15 donne compétence à la Commission pour accueillir et examiner une telle preuve lorsque un jugement a été rendu rejetant un appel et ordonnant l'exécution de l'ordonnance d'expulsion aussitôt que faire se pourra.-

L'article 17(c) des Règles de la Commission d'appel de l'immigration n'est d'aucun secours à l'appelant qui tente de présenter une nouvelle preuve après qu'il eût été disposé de l'appel.-

La Loi sur la Commission d'appel de l'immigration étant silencieuse sur la compétence de la Commission à accueillir une nouvelle preuve après disposition d'un appel, il devient nécessaire d'examiner une situation semblable dans d'autres juridictions judiciaires ou quasi-judiciaires.

En tant que cour supérieure d'archives, la Commission ne voit aucune raison de ne pas s'en tenir à la règle généralement suivie par les autres tribunaux de même compétence. La Commission par conséquent ne fera droit à une requête pour écarter la disposition finale d'un appel et pour faire accueillir une nouvelle preuve subséquente à une telle disposition que dans les cas suivants:

1. la partie qui cherche à présenter une telle preuve devra démontrer à la satisfaction de la Commission qu'elle n'a pas pu, tout en ayant exercé une diligence raisonnable, obtenir ladite preuve en temps utile avant l'audition de l'appel;
2. la preuve ainsi recherchée et établie de façon satisfaisante, devra être d'une nature telle qu'elle pourrait justifier la Commission de réviser son jugement rendu après audition de l'appel.

Requête rejetée.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.V. Scott

The Board heard arguments on three Notices of Motion filed in respect of the above applicants, in identical terms, requesting an order:

- "1. Setting aside that portion of an Order dated the 19th day of April, 1968 directing that the Deportation Order be executed as soon as practicable, and,
2. Permitting the applicant to file additional evidence establishing his character and suitability as a citizen of Canada

on the ground that additional evidence as to the character of the applicant and his suitability for Canadian Citizenship had, unknown to Counsel appearing on his behalf, been mailed to Counsel in sufficient time to ensure delivery prior to the hearing of the Appeal but was not so delivered."

The facts preceding the filing of the motions are briefly as follows:

The applicants appealed from deportation orders issued against them and their appeals were heard on April 11, 1968, Mr. McLaughlin appearing on behalf of all three appellants, and Mr. A.F. LePitre on behalf of the respondent, the Minister of Manpower and Immigration. At the hearing of the appeals (at which the appellants were not present) Mr. McLaughlin filed certain affidavit evidence relating generally to the character of the appellants and setting out the opinion of the deponents as to their general suitability for admission to Canada as permanent residents. At the conclusion of the hearing, the Board reserved judgment on these appeals, and after careful consideration, rendered its decision thereon on April 19, 1968, dismissing all three appeals and ordering that the deportation orders in respect of each appellant be executed as soon as practicable. Reasons for judgment were handed down May 1, 1968, and deal in some detail with the legality of the deportation orders, and also in respect of the Board's refusal to exercise the discretionary powers vested in it by Section 15 of the Immigration Appeal Board Act.

On May 3, 1968, the Notices of Motion were filed.

It is clear from the material filed in support of the Motions, that two further affidavits as to the character of the appellants were forwarded several days before the date of the hearing of the appeals by the appellants' counsel in Victoria, B.C. to Mr. McLaughlin, his agent in Ottawa, but through some unexplained delay in postal delivery, did not reach Mr. McLaughlin until April 16, 1968, five days after the hearing of the appeals, although, it must be noted, before the decision thereon was rendered.

At the hearing of the Motions, argument was directed to the jurisdiction of the Board to entertain them. Mr. McLaughlin suggested that additional evidence could be accepted by the Board, and its decision reconsidered even after the hearing of the hearing appeals and the disposition thereof, under the powers given to it by Section 15 of the Immigration Appeal Board Act.

Section 15 (3) and (4) of the Immigration Appeal Board Act provide:

15. (3) The Board may at any time

(a) amend the terms and conditions prescribed under subsection

(2) or impose new terms and conditions; or

(b) cancel its direction staying the execution of an order of deportation and direct that the order be executed as soon as practicable.

(4) Where the execution of an order of deportation

- (a) has been stayed pursuant to paragraph (a) of subsection (1), the Board may at any time hereafter quash the order; or
- (b) has been stayed pursuant to paragraph (b) of subsection (1), the Board may at any time thereafter quash the order and direct the grant of entry or landing to the person against whom the order was made.

Clearly, where execution of a deportation order has been stayed by the Board, additional evidence could be received and considered in respect of the powers given to the Board by these subsections. However, in the Board's opinion, nothing in Section 15 gives the Board power to receive and consider additional evidence where a decision has been rendered dismissing an appeal and ordering that the deportation order be executed as soon as practicable.

Mr. McLaughlin also referred to Section 17(c) of the Immigration Appeal Board Rules, which provides:

"The Board may

- (c) do all other things necessary to provide for the proper disposition of an appeal."

In the Board's view, this Rule does not help him, since he was seeking to introduce new evidence after the disposition of the appeal.

Section 7(2)(c) of the Immigration Appeal Board Act is also of interest:

"The Board...may...

- (c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it." (*Italics mine*).

It would appear that the Immigration Appeal Board Act and Rules, insofar as they deal with the point at all, provide only for the receipt of additional evidence before an appeal is disposed of. Since the Act is silent as to the power of the Board to receive new evidence after an appeal is disposed of, it is necessary to turn to analogous situations prevailing in respect of other judicial and quasi-judicial bodies.

Mr. Williams cited the case of *The Queen v. Gartland Steamship Lines*, (1958) Ex Ct. 69. In that case, after judgment had been rendered and entered on the records, a motion was brought for leave to present further argument on law. Cameron J. dismissed the motion, stating that his judgment had been pronounced and validly entered "and that consequently I have now no power to

entertain a motion such as the present one in which I am invited to hear further argument on a matter of law which was considered in my judgment."

Mr. Williams further drew the Board's attention to a very interesting article in (1956) C.B.R. 898, entitled "Rehearing in Appellate Courts", by R.E. Dignan and D.W. Louisell. This article discusses in some detail the rule existing in many States of the U.S. permitting appellate courts to rehear argument on appeals already dealt with by them. It would appear that although motions for such rehearing are frequent, they are very seldom granted, and rehearing would seem to be confined to a reargument, or further argument, as to law, rather than to the introduction of new evidence before the appellate tribunal.

Neither the Gartland case, nor the American decisions cited in Messrs Dignan and Louisell's article, are directly relevant to the problem confronting the Board in these motions. Counsel for the applicant is not seeking a rehearing of the appeals, or a further opportunity to argue applicable law; he is asking only that the Board receive and consider evidence which was, by unavoidable accident, unavailable at the hearing, and for reconsideration of that part of the Board's decision made pursuant to Section 15 of the Immigration Appeal Board Act.

The Immigration Appeal Board, though an appellate tribunal, is something of an anomaly, since under its statutory powers it can accept evidence at the hearing of an appeal, and many appeals are almost trials *de novo*, particularly in respect of the Board's discretionary jurisdiction under Section 15. The nearest analogy to a motion such as the one before us, would appear to be a motion for a new trial. In *Clayton v. Br. Amer. Securities Ltd.* (1935) 1 D.L.R. 432 (B.C.C.A.) it was sought to adduce additional evidence after judgment had been pronounced but before it was entered. The question arose whether, after judgment was pronounced, but before it was entered, additional evidence could be adduced. Per M.A. Macdonald, J.A.: "The point has not been squarely decided.... It is..... a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to reestablish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur."

Woodworth v Gagné (1935) 3 W W R 49 is abridged in 34 Can. Abr. (1st Ed.) 1204, as follows:

"Leave to Adduce Additional Evidence after Hearing - Discretion of Trial Judge.

After evidence had been taken, the trial Judge reserved judgment; but before any reasons for judgment were delivered, defendant applied to have the trial reopened and further evidence taken to show, in contradiction of the testimony for defendant, that a witness called by defendant could not have been present in plaintiff's office at the time a certain document put in evidence had been signed. Held, the rule in *Hosking v. Terry*, 15 Moo P.C. 493, 15 E.R. 581, 15 Mews 1705, should be applied. It reads: ".....the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of

himself and of his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and secondly, that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment." The Judge, therefore, had no untrammelled discretion in the matter, and under the circumstances, the application should be dismissed. Even if he had that discretion, not being convinced that it was in the interests of justice that the case should be reopened for further evidence, he would also have to dismiss the application, following *Clayton v. Br. American Securities Ltd.*, (supra).

In *Vareth v. Sainsbury* (1928) S.C.R. 72, Rinfret J. said "On application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that if adduced, it would be practically conclusive."

In *Halsbury's Laws of England*, (2nd edition) Vol. 19, page 267, the learned author states: (9 566) "An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the Court. It must be shown that such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new, and that it would not with reasonable diligence have been discovered before. A mere suspicion of fresh evidence is not sufficient.

567. The action may be commenced without leave, but the defendant may move to stay the proceedings on the ground that they are frivolous and vexatious, and on such application the Court should receive evidence on either side as to whether or not there has been a discovery of new and material evidence since the judgment."

This rule, which prevails in most, if not all, common law jurisdictions, is also set out in article 483 of the *Quebec Code of Civil Procedure*; "483. Likewise, where there is no other useful recourse against a judgment, the court which rendered it may revoke it at the request of one of the parties, in the following cases:

1. When the procedure prescribed has not been followed and the resulting nullity has not been covered;
2. When the judgment has decided beyond the conclusions, or when it has failed to rule on one of the essential grounds of the suit;
3. When, in the case of a minor or interdicted person, no valid defence has been produced;
4. When judgment has been rendered upon an unauthorized consent or tender subsequently disavowed;
5. When judgment has been rendered upon documents whose falsity has only been discovered afterwards, or following fraud of the adverse party;

6. When, since the judgment, decisive documents have been discovered whose production had been prevented by a circumstance of irresistible force or because of the act of the adverse party;
7. When, since the judgment, new evidence has been discovered and it appears that:
 - a. if it had been brought forward in time, the decision would probably have been different;
 - b. it was known neither to the party nor to his attorney or agent and
 - c. it could not, with all reasonable diligence, have been discovered in time

This will appear to be derived from the doctrine of estoppel by Res judicata. Osborne's Concise Law Dictionary, 5th Edition states "Res judicata presupposes that there are two opposing parties, that there is a definite issue between them, that there is a tribunal competent to decide the issue, and that within its competence, the tribunal has done so. Once a matter or issue between parties has been litigated and decided, it cannot be raised again between the same parties...."

In McIntosh v. Parent, 55 O.L.R. 552, Middleton J.A. said: "two totally distinct ideas are often confounded in speaking of res judicata. When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be retried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question or fact, once determined, must as between them, be taken to be conclusively established so long as the judgment remains... The other doctrine is often discussed under the maxim nemo debet bis vexari, or as merger by judgment, or splitting of a cause of action, and makes it obligatory upon a plaintiff asserting a cause of action to claim all his relief in respect thereto, and prevents any second attempt to invoke the aid of the Courts for the same cause, for on his first recovery his entire cause of action has become merged in his judgment and is gone for ever. There is no qualification of the general principle where the cause of action is one and the same."

In Maynard v Maynard, (1951) S.C.R. 345 Cartwright J. (as he then was) quotes with approval the statement of law by Wigram V.C. in Henderson v. Henderson 3 Hare 100, as follows: "I believe I state the rule of the Court correctly when **I say** that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject

of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." This passage has recently been approved by the Privy Council in the case of *Hoystead v. Commissioner of Taxation* (1926) A.C. 155 170.

The learned judge then continues "In the judgment of the Judicial Committee in *Hoystead v Commissioner of Taxation* (supra), at page 165, is the following: Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

In my opinion the law is correctly stated in Halsbury's Laws of England (2nd Edition) Volume 13 at page 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact".

The Board, as a superior court of record, sees no reason to depart from the general rules prevailing in sister courts. It will, therefore, grant a motion to set aside a final disposition of an appeal, and for the receipt of new evidence after such disposition only where

1. the party seeking to introduce such evidence proves to the satisfaction of the Board that he could not have obtained such evidence by reasonable diligence before the original hearing of the appeal, and
2. the evidence sought to be so introduced is of such a nature that, if satisfactorily proved, it would furnish a sufficient reason for reconsideration of the Board's original disposition of the appeal.

Applying this test to the motions before us, can it be said that the new evidence sought to be introduced, i.e. the affidavits of Paul K.W. Chan and Jack Quan, is of such a vital and material nature as substantially to change the nature of the appeals so as to furnish a sufficient reason for reconsideration of its original disposition thereof?

The answer, in the Board's opinion, is in the negative. It is true that the two affidavits sought to be introduced by the applicants are "new" evidence in the sense that counsel appearing at the hearing of the appeals could not by reasonable diligence have been aware of it at the time, but in no sense do these affidavits introduce any new element which would furnish a sufficient reason for reconsideration of the Board's original disposition of the appeal. These affidavits raise no issue which was not considered by the Board, on adequate evidence already before it, on its disposition of the appeals on April 19, 1968.

The Motions must therefore be denied.

Counsel:

For the applicants: M. McLaughlin, Barrister and Solicitor
 For the respondent: R.E. Williams, Barrister and Solicitor

Areti TSANTILLI (Illipoulos), applicant and

The Minister of Manpower and Immigration, respondent

Decision: September 9, 1968
(File no: 68-5167)

Coram: J.C.A. Campbell, Vice-Chairman, J.-P. Houle, U. Benedetti

Motion to re-open a hearing. - Jurisdiction of the Board. - The Board is a Superior Court of Record. - Functus officio: does not apply. - Inherent and continuing jurisdiction. - Circumstances which warrant an order to re-open. - Immigration Appeal Board Act: S.7; 14; 22. - Authorities and jurisprudence. -

Requête pour réouverture d'instance - Compétence de la Commission. - La Commission est une Cour supérieure d'archives - Functus officio: ne s'applique pas. - Compétence intrinsèque et continue. - Circonstances pouvant conduire à une ordonnance de réouvrir. - Loi de la Commission d'appel de l'immigration: Art. 7; 14; 22. - Doctrine et jurisprudence. -

Held: An appeal lies to the Board from an order of deportation made by a Special Inquiry Officer. To hear this appeal the Board has all the rights, the powers and the privileges which are vested in a superior court of record and furthermore the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdictions that may arise in relation to the making of an order of deportation. Functus officio, to easily and too often conceived as a doctrine, is merely an expression applied to an agent or donee of an authority who has performed the act authorized, so the authority is exhausted and at an end. Such an expression does not apply to a superior court, to a court with appellate jurisdiction. - The jurisdiction of the Board is continuing and before its order is executed nothing precludes or bars an appellant from filing with the Board a motion requesting an order to re-open and it will be for the applicant to show that in his case very special circumstances warrant such an order. The effect of the filing of a motion is only to suspend pro tempore the execution of an order. It is for the Board to pronounce whether the motion est bien fondée or futile or frivolous. What should constitute very special circumstances warranting a re-opening? The Board has not as yet rules governing the matter but the Board, pursuant to S. 7 and S. 22 of the Immigration Appeal Board Act has the jurisdiction to pronounce on the matter and such a jurisdiction is inherent and discretionary. Furthermore the Board has an inherent jurisdiction in equity. - The Board has jurisdiction to order the re-hearing of an appeal.

Affidavits were filed by both parties in respect to the motion: these contained allegations related to the merits of the appeal and were in such flagrant contradiction that the only report to achieve the ends of justice is by way of a thorough and proper testing of such evidence and this has to be done by way of re-opening.

Motion granted.-

Arrêt:- Il y a appel à la Commission d'une ordonnance d'expulsion rendue par un enquêteur spécial. Pour entendre cet appel, la Commission possède tous les droits, les pouvoirs et les privilèges d'une cour supérieure d'archives et, de plus la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction qui peuvent se poser à l'occasion d'une ordonnance d'expulsion. Functus officio, trop souvent et trop facilement élevée au rang de doctrine, n'est qu'une expression pour désigner qu'un agent ou un commis a exécuté un acte prescrit, de telle façon que son autorité a été complètement exercée et a cessé d'exister. Une telle expression ne s'applique pas à une cour supérieure, à une cour qui a juridiction d'appel.-La compétence de la Commission est continue et avant que son ordonnance ne soit exécutée, rien n'empêche un appelant d'inscrire une requête aux fins d'obtenir une ordonnance de réouverture d'instance, et il appartiendra à l'appelant d'établir les circonstances très particulières justifiant une telle ordonnance. L'inscription d'une telle requête n'a pour effet que de surseoir pro tempore à l'exécution d'une ordonnance d'expulsion. Il appartient à la Commission de décider si la requête est bien fondée ou si elle est futile et frivole. Quelles sont les circonstances très particulières qui justifient une réouverture d'instance? La Commission n'a pas encore de règles en la matière mais selon les articles 7 et 22 de la Loi de la Commission d'appel de l'immigration, la Commission a compétence pour en décider et cette compétence est intrinsèque et discrétionnaire. De plus la Commission a une compétence intrinsèque d'équité. - La Commission a compétence pour ordonner qu'un appel soit réentendu.

La preuve sous serment fournie par les deux parties est inéprouvée et elle est d'une si flagrante contradiction que le seul moyen de faire justice est de soumettre cette preuve à un examen minutieux par voie de réouverture d'instance.
Requête accueillie.-

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.-P. Houle:-

THIS IS A MOTION TO RE-OPEN THE HEARING OF THE APPEAL
of Areti Tsantili (Iliopoulos) against an order of deportation made
by a Special Inquiry Officer on the 13th day of February, 1968.

The appeal was heard by the Immigration Appeal Board on the 22nd day of April 1968 and was dismissed on the same day and the Board further ordered and directed that pursuant to Section 15(1) of the Immigration Appeal Board Act, the deportation order be executed as soon as practicable. At the hearing the appellant was not present nor was she represented. The Respondent, the Minister of Manpower and Immigration, had filed a written submission on the 18th day of April, 1968.

The Board heard this motion to re-open the hearing of the appeal on the 9th day of July, 1968. The applicant was represented by Mr. Andrew F. Brewin, Q.C. M.P., of Toronto, Ontario, and Mr. R.E. Williams, Barrister and Solicitor appeared for the Minister of Manpower and Immigration.

In the course of their submissions counsel discussed the merits of the case. The Board however will not consider the merits since this is strictly a motion to re-open with the basic issues being: 1) does the Board has jurisdiction to re-open the hearing of an appeal and if the Board does have such jurisdiction, 2) are there sufficient grounds for the Board to order the re-opening of the hearing in the instant case.

The first submission of the applicant is that through no fault of her own she was not made aware of the date set for the hearing of her appeal and she did not attend at the appeal and involuntarily failed to present her case to the Board. Material in support of this submission is in the form of an affidavit by the applicant filed by her counsel with a Notice of an Application for the re-opening of the appeal, and dated the 24th day of May 1968.

Records of the Board pertaining to this matter should be looked at before examining the aforesaid affidavit. A persual of these records reveals that the appellant had filed a Notice of Appeal on the 13th day of February 1968, same Notice including a further notice "that all notices and papers in connection with my appeal may be sent to me as follows: Areti Tsantili, 177 Spadina Avenue, Toronto, Ontario." The Notice of Hearing of the Appeal has been mailed to the applicant on the 3rd day of April 1968 at the address mentioned above in accordance with Rule 9 of the Immigration Appeal Board Rules: "9. Notice of the time and place of a hearing shall be sent by the Registrar to the appellant and the respondent and their counsel be registered mail at the addresses set out in the Notice of Appeal or the Reply.": and Rule 25(2) says: "Where service is effected by registered mail, the effective date of such service shall be the date of mailing."

In the same Notice of Appeal, the applicant served further notice whereby she authorized a Mr. John Hladun, Public Relations Consultant, whose address is 31 Concord Avenue, Toronto 4, Ontario, to represent her as her counsel of record in all matters relating to her appeal: and the applicant gave further notice that she wished to be present or represented at the hearing of the appeal to make oral submission to the Board. The above mentioned Mr. Hladun wrote to the Immigration Appeal Board on April 3rd, 1968, saying, inter alia,: "This to advise you that I have resigned as a counsel to the above-named (Areti Tsantili) and shall not appear before you to plead her case if and when the hearing of her appeal will be held." Receipt of the aforesaid letter was acknowledged in a letter dated April 5th, 1968, under the signature of R. Hélie, Deputy Registrar. The Board set the 22nd day of April, 1968, for the hearing of the appeal.

The affidavit of the applicant dated 24th May, 1968, reads as follows:

"I, ARETI (TSANTILI) ILIOPOULOS, of the City of Toronto, in the County of York, Married Woman, MAKE OATH AND SAY AS FOLLOWS:

1. I am a citizen of Greece and came to Canada as a visitor in the month of July 1967 to visit my uncle Peter Golias who lives in Toronto at 177 Spadina Avenue.

2. On the 13th day of February, 1968 an order for my deportation was made by a Special Inquiry Officer.

3. I entered an appeal to the Immigration Appeal Board. I was represented at the Inquiry by one John Hladun but as I was unable to pay the fee which he requested he ceased to represent me after the Inquiry.

4. On or about the 1st day of April, 1968 my father came to Canada to visit me at the time of my marriage to Thomas Iliopoulos whom I had known in Greece and to whom I was engaged to be married. I moved to 749 Euclid Avenue where my father was residing. My new address was given to the Immigration Office in Toronto by my fiancée.

5. On the 22nd of April, 1968 I was married to the said Thomas Iliopoulos at the Greek Orthodox Church at 115 Bond Street, Toronto, and we have lived together as man and wife at 35 Follis Avenue, in Toronto, as my husband reported to the Immigration Office at Toronto.

6. On the 22nd day of April, 1968, as I know now, my appeal was dismissed by the Immigration Appeal Board.

7. I received no notice of the hearing of the appeal. My husband was called by my uncle on the 4th day of May, 1968 on the telephone and when my husband went over to see him a letter notifying me of the date of the hearing of the appeal contained in an envelope addressed to me at 177 Spadina Avenue was shown to him. For some reason my uncle had withheld this letter and I knew nothing of the appeal hearing until the 4th of May, 1968.

8. It was always my intention to make representations at the hearing of my appeal and in particular to call the attention of the Immigration Appeal Board to my marriage.

9. My husband is a landed immigrant who came to Canada on the 3rd of May, 1963. He is steadily employed as a machinist."

The relevant parts of the affidavit in relation to the applicant's first submission are 1) that on her arrival in Canada, the applicant resided at 177 Spadina Avenue; 2) that on or about the 1st day of April, 1968, she moved to 749 Euclid Avenue and that her new address was given to the Immigration Office in Toronto; 3) that she received no notice of the hearing of the appeal and that she knew nothing of the appeal hearing until the 4th of May, 1968; 4) that it was always her intention to make representations at the hearing of her appeal.

Suffice it to be, at this stage, for the Board to note that Records show that Notice of Hearing of an Appeal had been mailed by registered mail on the 3rd day of April, 1968, that the affidavit referred to above is a sworn affidavit and that said affidavit had not been tested and remains, up to this moment, untested.

The second submission of the applicant is that (1) on the 22nd of April, 1968, she was married and has lived since with her husband, as man and wife, at

36 Follis Avenue, in Toronto; (2) at the time of the hearing of the appeal there was nothing before the Board to show that the applicant was either about to be married or was in fact married on the same day as the appeal was heard and that the Board had disposed of this matter without any knowledge of her marriage.

The marriage here is not in dispute and the Board recognizes that at the time of the hearing it had no information on it.

The third submission of the applicant is that "it seems to me that the original order unquestionably would have been modified had the Board known this fact" (that is the fact of the marriage).

This third submission of the applicant will be dealt with more appropriately in an examination of the legal arguments.

The legal argument of the applicant is based on the following basis: 1) Section 7(1) of the Immigration Appeal Board Act constitutes the Board a Court of Record and subsection (2) of same Section 7 gives the Board in matters necessary and proper for the due exercise of its jurisdiction, all such rights, powers and privileges which are vested in a Superior Court of Record, and Section 22 gives the Board sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an Order for Deportation; 2) a Superior Court of Record has an inherent jurisdiction which extends to the right of re-hearing and it is one right that ought to be exercised where it appears that an injustice may have been done or that the Court may have unconsciously acted on a wrong presumption of facts; this inherent right is also a discretionary right to be exercised where there is a default judgment, where the judgment is not a full judgment of the matter, and cannot be fully determined in the absence of one of the parties.

As an illustration of the two principles enunciated above as being the substratum of the exercise of the inherent and discretionary right of re-hearing, Counsel for the Applicant has referred to several cases:

Shaw v Nickerson 7 Upper Canada Queens Bench Reports, 541.

Hughes v Peel 9 Ontario Practice Reports, 127.

Fleet v Wey 14 Practice Reports, 123.

Davis v Tunnel Bridge Spinning Co. Ltd., reported in
27 Butterworth's Workmen's Compensation Cases, 207

Although the decisions in the cases cited have been rendered by very learned and powerful Judges and refer to some basic principles underlying the rule, three of them are only slightly relevant to the matter involved in the present instance: the right to re-open or re-hear an appeal. The first three cases deal with the setting aside of orders made by default or ex parte, by Judges or Masters in chambers. The fourth case deals with the so-called doctrine of functus officio and in that case all the judges were of the opinion that the doctrine did not apply unless the matter was fully completed.

Counsel for the Applicant draws the conclusion that when a court was made aware that it had decided something wrongly without a full apprehension of the facts, it always had jurisdiction, a basic equity jurisdiction, to do justice; that the doctrine of functus officio would apply to administrative tribunals only and therefore not to the Board since the Board is a Superior Court of Record vested with an inherent jurisdiction.

The submission of the Respondent is that the facts and the material submitted show that this motion is substantially without grounds. In support of this submission the Respondent has filled an affidavit dated and sworn on the 26th day of June, 1968 by Mr. John Hladun, the same gentleman previously referred to, and two statutory declarations one from Immigration Officer W.J. Hartley and the other by Immigration Officer H.A. McCauley and both dated on 5th day of July 1968. It should be noted and it is deplored that evidence of this nature, the two statutory declarations, were not communicated to the Applicant nor to the Board before the hearing of the motion to re-open but were submitted at the opening of the hearing of the said motion.

The relevant part of the affidavit of Mr. John Hladun is: "4. Subsequently, I advised Areti Tsantili, through her uncle Mr. Peter Golias, and in her presence, of the contents of the letter I had received from the Deputy Registrar, and in particular of the date and time of the hearing of her appeal." The letter referred to from the Deputy Registrar is dated 5 April 1968.

Statutory Declaration by Immigration Officer H.A. McCauley recites that:

"Areti Tsantili reported to this office 20 March 1968 with her cousin's wife and daughter. The daughter spoke perfect English and Miss Tsantili situation in regards to the Immigration Division was fully explained. The cousin's daughter acknowledged this and explained to Miss Tsantili in the Greek language.

They asked for Miss Tsantili passport saying she intended marriage and required same for identification. They were under the impression her immigration status had been cleared.

The fiance reported 2 April 1968 - Thomas Iliopoulos - and wanted to take over the responsibility of the Bond of Conditional release and stated he would marry Miss Tsantili in any case. He also stated her relatives in Toronto were against this marriage. I explained to Mr. Iliopoulos that the notice of appeal was not yet received and suggested when Miss Tsantili received her notice of appeal he could appear at the appeal hearing with her and state his intentions.

On 3 April 1968 Miss Tsantili's relative Mr. Peter Golias appeared to state Miss Tsantili had left his home to live with Mr. Iliopoulos at 274 Euclid Avenue and wanted to withdraw his support.

The Notice of Hearing and Decision of appeal was sent to 177 Spadina Road the home of Mr. Peter Golias and Mrs. Golias claimed any mail received was picked up by Mr. Iliopoulos.

On May 1, 1968 Miss Tsantili reported to this office with Mr. Thomas Iliopoulos and presented their marriage certificate, copy of this on our file. Mr. Iliopoulos denied everything that was discussed with him previously and was under the impression their marriage automatically cancelled the deportation decision by the Immigration Appeal Board. He had this notice in his possession.

He, Mr. Iliopoulos, then stated he would send his wife to his sister in Germany and would submit an application for her legal admission to Canada.

I agreed to allowing voluntary departure and instructed them to inform this office of travel arrangements.

and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "THE CANADA EVIDENCE ACT".

Statutory Declaration of Immigration Officer W.J. Hartley declares that:

"On April 9, 1968 Miss Areti Tsantili reported to this office accompanied by her fiance Mr. Thomas Iliopoulos. At that time she had in her possession the "Notice of Hearing" dated April 3, 1968 from the Immigration Appeal Board. It was explained to her that she should appear in person at the hearing and if she wanted the fiance could accompany her. They mentioned the plan to marry before the hearing and therefore we emphatically stated if this happened they should both appear and take their marriage license. This couple were fully aware of the Appeal Hearing date and I would repeat the "Notice of Hearing" was in her hand."

and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "THE CANADA EVIDENCE ACT".

The aforesaid affidavit, the two statutory declarations and the affidavit filed by the Applicant, have not been tested and remain untested.

The matter involved here is one of a motion to re-open and the Board followed the normal procedure in dealing with it on the material submitted, namely the affidavit evidence.

Having heard the submission in relation to the material introduced and having examined this material, the Board finds that it is faced with diametrically opposed affidavit evidence, with evidence which is in complete contradiction and the Board cannot but draw the conclusion that such evidence must be duly and properly tested with the view of achieving the ends of justice in this case.

Now the question is: does an order to re-open the hearing of the appeal of Areti Tsantili constitute the appropriate remedy: will the re-opening of the hearing pave the way for justice to be rendered?

This question brings the Board back to the basic issues in this application: 1) does the Board have jurisdiction to re-open the hearing of an appeal, and 2) if the Board does have such jurisdiction are there sufficient grounds for the Board to order the re-opening of the hearing in the instant case?

The legal argument of the Respondent rests on two branches: one is that the judgment pronounced by the Board at the hearing of the appeal of Areti Tsantili, on the 22nd day of April 1968, is not a default but a final and conclusive judgment. It is not an ex parte judgment: the second is that in law the Board is now functus officio.

In support of the second branch of his argument Counsel for Respondent cited abundantly from Her Majesty the Queen and Gartland Steamship Company, 1958 Exchequer Court Reports, 69, a case (motion) before Mr. Justice Cameron in Chambers. The basic question at issue being: when does a judgment from this Court (Exchequer) become final and operative? Counsel speaking against the motion argued that once a judgment was entered the court was functus officio and that the entry in a docket book (pursuant to Section 81 of the Exchequer Court Act) was an entry of the judgment and that was all there was to it. Against that Counsel speaking for the motion argued that a judgment is not really entered until the formal order with the minutes of it have been brought in and entered: until then the court had the power to vary its own orders.

This matter of entry of judgments in a docket book is of a rather technical nature and to deal with it even by way of analogy, since the Board has no rule on the subject although it keeps a book of records, would be a specious generalization. Rule 174 of the Exchequer Court recites: "Where any judgment is pronounced by the Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced and the judgment shall take effect from that date, unless the Court shall otherwise order or direct that the judgment be ante-dated or post-dated." One is at some difficulty trying to couple this Rule with the so-called doctrine of functus officio.

Counsel for the Respondent in his submission to the Board went on to say: "this decision (the Board's decision) was made on the 22nd April and it is recorded in the record books of this Board what the decision was. I suggest therefore that the decision is final, that is it, that the Board is functus officio as Mr. Justice Cameron said the Exchequer Court was under similar circumstances." (Her Majesty the Queen and Gartland Steamship Company).

The Board would find it extremely difficult to accept the suggestion from Counsel "that the Board is functus officio as Mr. Justice Cameron said the Exchequer Court was under similar circumstances". First one cannot find in the judgment referred to supra that Mr. Justice Cameron has said that the Exchequer Court was functus officio. It was rather a submission made by Counsel for the defendants opposing the application on the ground that the Court is without jurisdiction to grant leave to present further argument; secondly one is not struck by the similarity of the circumstances: the instance before Mr. Justice

Cameron was one of a motion for leave to present further argument after judgment and the head note of the report reads: "Held: That after a judgment has been pronounced and entered the Court is powerless on a matter of law which was considered in the judgment." The instance before the Board is one of a motion requesting an order to re-open a hearing and once again the basic issues are: does the Board has jurisdiction to re-open and if so are there proper grounds submitted to the Board on which it can order such a re-opening.

It is of some interest to cite Mr. Justice Cameron in the Gartland Steamship case at page 75: "I have looked at the report of the Copeland-Chatterson case referred to above. (Copeland-Chatterson v Paquette (1906) 10 Ex. C.R. 425). So far as I am aware, it is the only reported case in which the Court has allowed a motion to reconsider the terms of a final judgment. There is nothing in the judgment as reported to suggest that the question of the Court's jurisdiction to hear such a motion was raised or considered. It seems to have been assumed that the Court had such jurisdiction, possibly by reason of the then Rule 174"

Also in support of his argument that the Board was functus officio in regard to this matter, Counsel for the Respondent relied on decisions rendered by the Board in Moreira and Da Silva (heard on April 9, 1968) and in Federico De LosReyes (decision rendered on June 6, 1968.) Here again Counsel for Respondent relies on the similarity of these cases to the instant case and again the Board finds difficulty in accepting the suggestion of similarity. True that in Moreira and Da Silva, Chairman of the panel, in a decision rendered from the Bench, has pronounced "that the Board is now functus officio" but the remainder of the pronouncement has to be cited: "and it is not possible for us to direct the re-opening of the inquiries". Not possible for us to direct the re-opening of the inquiries. This is the part of the pronouncement which has to be retained and which annihilates any suggestion of similarity. It may well be doubted that the Chairman of the panel was at liberty to pronounce the Board functus officio but the motion entertained was one for the re-opening in order to adduce fresh evidence. The Board decided, and properly so, to apply the general principles that to re-open a trial it must appear that both the evidence could not by due diligence have been made available at the trial and also if admitted that it would be practically conclusive. The same principles were held and applied in Federico De Los Reyes (reason given by A.B. Weselak, Member), in Chen Wu and Fung (reasons by J.V. Scott, Chairman) and in Ali Sleiman Yehia and Hussein Sleiman Yehia (reasons given by J.C.A. Campbell, Vice-Chairman). These decisions rendered by the Board are of little assistance in the matter now before the Board where there is no question of introducing new evidence or, at least, where there is no question of seeking the granting of a motion on the basis of new evidence to be adduced.

Having disposed of this branch of his argument, that the Board is functus officio in regard to this matter, Counsel for Respondent raised the question as to whether this Board ought to re-open the appeal, which question is of law.

Counsel for the Respondent then said: "I have been unable to find any authorities dealing directly with the question." The rarity of authorities and the paucity of the doctrine on the subject is an euphemism. To quote Counsel: "A case in the Supreme Court of Canada in 1949 called the Boucher case shed no

light whatever on the grounds argued or the reasons given for entertaining a new appeal." There would be, according to Counsel, another example of a re-hearing of an appeal by the Supreme Court in the Poole case (yet unreported) but there again "there is no indication as to why the court re-heard that appeal, having already dealt with it, one might presume conclusively". It would appear that these constitute the whole of the cases of re-hearing.

Rule 61 of the Rules of the Supreme Court of Canada provides that "There shall be no re-hearing of an appeal except by the leave of the Court on a special application, or at the instance of the Court". One must say, in all due deference, that the conciseness of the Rule is not of great help in trying to reason the matter now before the Board. It is a fact that the Board has as yet no rules governing the re-hearing of appeals but the Board has, unquestionably, the power to enact such rules whenever it sees fit to do so.

The argument of Counsel for the Respondent is that there may be some inherent jurisdiction in the Board to re-open a case, that there is no doubt that in an appropriate case it must be possible to re-hear, but this is not an appropriate case and that in any event there are certain considerations which ought to be gone into at any time when the Board is going to re-open.

In trying to shed some light on the matter Counsel for the Respondent referred the Board to and relied, to a great extent, on an article written by two learned American jurists at the invitation of the Editors of The Canadian Bar Review and published in Vol. 34 for the year 1956 of same Review. (pp: 898-938) The article is entitled "Rehearing in American Appellate Courts" but actually it goes into Canadian law as well. Needless to say the Board is not bound by an article however learned its authors may be. However, the Article referred to is worthy of a careful reading and gives ample food for thought.

The article gives some examples of instances in which a court might re-open to re-hear.

- Where the Court has overlooked, misapplied or failed to consider a statue, decision or principle;
- Where the Court has overlooked or misconceived some material fact;
- Where the Court has overlooked or misconceived a material question in the case;
- Where there is serious doubt over the validity or correctness of precedent relied upon and the case itself is of great precedent potential or of grave public interest. (p. 908)

On page 910 one can read that "There is general agreement that rehearing will not be granted merely for the purpose of again debating matters on which the court has once deliberated and spoken - on this rules, cases and justices speak with one voice." One may say that this is only common sense in common law - to coin a phrase - and the Board will not raise a dissenting note in that concert of voices, for it is obvious that any appellate court would not re-open just to give another day in court to a dissatisfied plaintiff or to a frustrated lawyer. When an appeal has been fully heard and judgment pronounced a Court will not grant leave to re-open except under very special circumstances, almost compelling, which will warrant such a recourse with the view that the ends of justice are fully met, and for the proper discharge of judicial function. The onus to show those very special circumstances, rests upon the party who is seeking re-opening and although it could be a very heavy one, nothing bars anyone in trying to get relief. Finally it

would seem from the reading of the article already referred to that re-hearings are not granted when the object of the motion is to obtain a "re-statement" and one which would not change the practical result of the decision.

Now if one turns to page 913 of the article one will read: "We already adverted to four general grounds which appear in the rules and statutes and are supported by letters from the several appellate courts and their decisions. In addition to these, cases have granted rehearing to cure defects of parties or where one of the parties made no appearance because of lack of notice, where the party who appealed had no appealable interest, and to amend an inadvertent confusion in the mandate." The phrase "lack of notice" could mean in the Board's opinion where notice has not been sent, has not been served, has not been properly served or has not been duly received.

In their conclusion the authors say: "Rehearing in theory is a conscientious judicial effort to make the appellate process as good as it can be The real quality of rehearing is (thus) a function of the quality of the judges."

Having heard the submissions made by both parties and having examined with the greatest care the legal arguments presented by their Counsel as well as the pertinent law, statutes and cases, the Board had come to the following conclusion taking into consideration that the question raised in the present instance is of great significance and importance as it involves the exercise by the Board of its appellate jurisdiction:

1- The Statute governing the Board and which is embodied in the Immigration Appeal Board Act (14-15-16 Elizabeth II, ch. 90) provides in S.7 that:

- (1) The Board is a court of record and shall have an official seal, which shall be judicially noticed.
- (2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record"

and S. 22 provides that:

"Subject to this Act and except as provided in the Immigration Act, the Board has sole and exclusive jurisdiction to hear and determine all questions of jurisdiction, that may arise in relation to the making of an order of deportation"

and S. 14 provides that:

"The Board may dispose of an appeal under section 11 or Section 12 by

- (a) allowing it:
- (b) dismissing it; or

- (c) rendering the decision and making the order that the Special Officer who presided at the hearing should have rendered and made."

Thus an appeal lies to the Board from an order of deportation made by a Special Inquiry Officer. To hear this appeal the Board has all the rights, the powers and the privileges which are vested in a superior court of record and furthermore the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction.

Functus officio, too easily and too often conceived as a doctrine, is merely an expression applied to an agent or donee of an authority who has performed the act authorized, so that the authority is exhausted and at an end. (Bedwell v Wood (1877) 2 Q.B.D. 626). Such an expression does not apply to a superior court, to a court with appellate jurisdiction.

Thus judgments pronounced and decisions rendered by the Board are Res Judicata. However the Board is continuing, its jurisdiction is continuing and before its order is executed nothing precludes or bars an appellant from filing with the Board a motion requesting an order to re-open and it will be for the applicant to show that in his case very special circumstances warrant such an order to re-open. This seems to be what it is meant under Rule 61 of the Rules of the Supreme Court of Canada. The effect of the filing of a motion is only to suspend pro tempore the execution of an order. It is for the Board to pronounce whether the motion is bien fondée or whether the motion is futile and frivolous. What should constitute very special circumstances warranting a re-opening? As it has been said *supra* the Board has not as yet rules governing the matter but the Board, pursuant to S. 7 and to S. 22 of the Immigration Appeal Board Act has the jurisdiction to pronounce on the matter and such a jurisdiction is inherent and discretionary. Furthermore the Board has an inherent jurisdiction inequity.

Thus the Board has jurisdiction to order the re-hearing of an appeal and having said so the Board has disposed of the first basic issue in this instance.

2- Has the applicant showed that there are very special circumstances warranting the exercise by the Board of its inherent and discretionary jurisdiction?

The Board is unable to entertain the submission that its judgment in the appeal of Areti Tsantili is a default judgment or an *ex parte* judgment. At the hearing on the 22nd day of April 1968, the appellant was not present nor was the respondent and both were not represented although the Respondent had filed with the Board a written submission. The Board proceeded by applying Rule 18 of the Immigration Appeal Board Rules which reads: "If at the time set for the hearing of an appeal neither of the parties thereto is present and no one is present to represent them, the Board may review the Notice of Appeal and the record together with any written submission that may have been made to the Board in respect of the appeal and render its decision thereon".

It has been submitted that the Board has rendered its decision in the ignorance of the marriage or the impending marriage of the appellant. True that at the time of the hearing of the appeal the Board has no information on the marriage. The marriage could constitute a new fact, could be a material factor but the Board is unable to decide on that matter on the hearing of this motion and the Board is also unable, at this stage to entertain the submission made by the applicant that the Board would not have made an order dismissing the appeal

and directing the execution of the deportation order, if it had known the fact of the marriage. This is a matter for the Board to decide pursuant to S. 15 of the Act which gives the Board exclusive discretionary power to stay or quash an order of deportation on compassionate grounds. But such an extraordinary jurisdiction can be exercised only after the Board has exercised its jurisdiction pursuant to S.14 of the Act. This instance being one of a motion, the marriage at this stage is a secondary issue. The main issue is that the applicant had not received notice of the hearing of her appeal. The applicant has declared in a sworn affidavit that she had not received notice and that consequently, through no fault of hers she was unable to attend the hearing of her appeal. In the same affidavit the applicant declares "it was always my intention to make representations at the hearing of my appeal." Same intention has been manifested in her Notice of Appeal of the 13th day of February 1968. This affidavit is contradicted by a sworn affidavit of the appellant's former counsel and by two statutory declarations made and signed by two Immigration Officers.

The entirety of this affidavit evidence remains untested and could not have been properly tested at the time of the hearing of this motion. Again, this whole affidavit evidence is in so flagrant contradiction, that the only resort to achieve the ends of justice is by way of a thorough and proper testing of such evidence.

For all the reasons given above, the Motion of the Applicant requesting an order to re-open her appeal is granted, and it is hereby directed and ordered that the appeal be re-opened and re-heard at a time and place to be ordered by the Board.

Counsel:

For the applicant: A.F. Brewin, Q.C., M.P.

For the respondent: R. Williams, Barrister and Solicitor

Georgios MAROUDAS, appellant and

The Minister of Manpower and Immigration, respondent

Decision: September 13, 1968
(File no: 68-5376)

Coram: J.V. Scott, J.A. Byrne, G. Legaré

Ship desertion - Entry without approval - Conviction - Detaining order while imprisoned. - Best evidence not required to prove arrest and ship's departure- Physical arrest unnecessary - Right of prisoner at Inquiry as against arrested person - Right of Immigration Officer to detain - Notice of detention equivalent to arrest - Immigration Act: SS. 13, 15(3), 16, 17, 19(1)(e)(x), 50 (b).
Authorities and jurisprudence.-

Désertion d'un navire - Entrée sans autorisation - Condamnation - Ordre de détention durant emprisonnement. - Preuve absolue de l'escale et du départ du navire non requise - Arrestation physique superflue - Droits à l'enquête d'un prisonnier à l'encontre d'une personne arrêtés - Droits d'un fonctionnaire à l'immigration d'ordonner détention - Ordonnance de détention équivaut à arrestation - Loi sur l'immigration: Art. 13, 15(3), 16, 17, 19(1)(e)(x), 50(b). - Doctrine jurisprudence.

Held:-Balance of probabilities suffices to determine a ship's departure from Canada - Section 16 of the Act comprehends both physical arrest plus detention and mere detention - Restricting inquiries for a prisoner under S. 15(3) would privilege him in relation to a person arrested under S. 16 - Immigration Officer has right to detain equivalent to arrest. Per Scott, Chairman, dissenting: The deportation order against appellant is a nullity since the inquiry held here pursuant to Section 25, and not Sections 23, 24, 19 plus 26, 15 nor 16 plus 25, should have followed not only an arrest put also a detention pursuant to section 16, as Immigration Act is similar to a penal statute, to be strictly construed.

Arrêt:-L'équilibre des probabilités suffit pour déterminer le fait du départ du Canada d'un navire - L'article 16 de la Loi comprend aussi bien l'arrestation physique et la détention que la détention seule - Restreindre l'enquête pour un prisonnier en vertu de l'art. 15(3) l'avantagerait sur une personne arrêtée sans mandat en vertu de l'art. 16 - Le fonctionnaire à l'immigration jouit d'un droit de détention équivalent à une arrestation. Par Scott, président, dissident: l'Ordonnance d'expulsion de l'appelant est nulle puisque l'enquête tenue en l'espèce devait faire suite à détention car la Loi est semblable à un statut pénal et doit s'interpréter rigoureusement.-

Le jugement de la Commission fut rendu **par:**
The judgment of the Board was delivered by:

J.A. Byrne

The order of deportation reads:

- 1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remained in Canada after the departure of the vehicle on which you came into Canada;
- 4) in accordance with subsection (2) of section 19 of the Immigration Act, you are subject to deportation.

On or about June 7, Mr. Maroudas, a 23 year old citizen of Greece and a member of the crew of S.S. Mango left his ship at Carleton-sur-mer, Québec, and proceeded to Montréal where he subsequently took employment and remained. On March 21, 1968, Mr. Maroudas was apprehended by the R.C.M. Police. The following day in Court of Sessions in Montreal he was convicted of violation of subsection (b) of Section 50 of the Immigration Act. Conviction was certified by Exhibit A filed with the Board and dated March 22, 1968. Failing to pay a fine of \$300.00 and cost of \$5.90, he began at one to serve the alternative sentence of three months in prison.

The burden of argument on points of law presented by Counsel for the appellant were in respect of the jurisdiction of the Special Inquiry Officer under Sections 16 and 25 of the Immigration Act and that approval for the subject to remain in Canada after the departure of his ship was implicit in the undertaking that a letter from counsel dated March 29, 1968, to Mr. Pépin, seeking such approval, be admitted to the records of the Special Inquiry Officer hearing (Exhibit E of the Special Inquiry Officer records) and that therefore the appellant was not in violation of subparagraph (x) of paragraph (e) of Section 19 of the Immigration Act.

Principal issues raised by counsel on points of law are as follows:

1. "did the Special Inquiry Officer follow the rules of natural justice in the administrative proceedings to determine the deportability of the appellant;
2. was the decision and deportation order of the Special Inquiry Officer dated May 13, 1968 in accordance with the Inquiries Act, the Canada Evidence Act and the Immigration Act;
3. was the inquiry caused to be held forthwith concerning the appellant, and did the Special Inquiry Officer proceed with reasonable dispatch after he opened the inquiry;
4. did the Special Inquiry Officer, having begun a hearing, have the right to adjourn sine die;
5. did the Special Inquiry Officer conduct the hearing in accordance with accepted procedure; i.e. application of Sections 16 and 25 of the Immigration Act;

6. did the Special Inquiry Officer determine beyond all reasonable doubt that the S.S. Mango had in fact left Canadian waters prior to arrest of the appellant and having failed to do so, could the appellant rightfully be charged under section 19(1)(e)(x) of the Immigration Act."

In respect of the foregoing points enumerated, 1 to 6, the Board had little difficulty in its conclusions.

1. The transcript of the proceedings of the Special Inquiry seems to indicate the Officer in charge conducted the hearing with decorum, patience, and in accordance with his authority under Section 11 of the Immigration Act;
2. The decision and deportation order were in accordance with the Immigration Act and insofar as they apply with the Inquiries Act and the Canada Evidence Act;
3. The inquiry was held with all due haste under the circumstances, i.e. the detention order directed to the Governor of the Montreal Prison (Exhibit A5 of the records) was made on March 22, the letter of convocation was addressed to Mr. Maroudas March 27, the hearing began April 4.
4. The Board found no reason to question the authority of the Special Inquiry Officer to adjourn the hearing sine die and noted that the records indicate good and sufficient reasons to do so, in order that the "rules of natural justice might obtain";
5. The authority of a Special Inquiry Officer to hold an inquiry while the subject is in a jail will be dealt with in determining the legality of the proceedings;
6. The Board has on several occasions commented on the necessity of proof of the departure of the vessel when a deportation order is based on Section 19(1)(e)(x). In the instant appeal the evidence relating to the departure of the S.S. Mango was in no sense "best evidence". However, from the cumulative effect of the evidence actually before it, the Board may reasonably conclude that the S.S. Mango had in fact departed at the time of the special inquiry. This evidence is as follows:-
 - 1) The Crew Index Card filed by the Master of the vessel and dated June 15, 1967. (Exhibit "C" to the minutes of inquiry).
 - 2) Telex and letter from Paul Paquet, Secretary, Lacroix Lumber limited, agents for the ship, stating that the ship left Carleton on June 15, 1967, bound for London, England (Exhibit "D" to the minutes of inquiry).

- 3) Exhibits B and C filed at the hearing before the Board relating to the deposit and recovery thereof made on behalf on the owners of the vessel in respect of Maroudas, pursuant to Section 66 of the Immigration Act.
- 4) The fact that some 10 months had elapsed between the alleged departure of the S.S. Mango and the commencement of the inquiry.

As previously stated Counsel based his appeal, in substance, on the jurisdiction of the Special Inquiry Officer under Sections 16 and 25 of the Immigration Act.

Page 22 of the record of the Appeal Board hearing:

"Mr. Cohen:

Where were you arrested?

(Interjection by Madam Chairman)

Chairman:

Do we care about this?

Mr. Cohen:

Yes, because I say that the Special Inquiry Officer had no jurisdiction because he was not arrested pursuant to Section 16."

Pages 39 and 40 of the record of the Appeal Board hearing:

"Mr. Cohen:

That is how he started the inquiry. He did not start with an arrest pursuant to Section 16, he started it with a letter of convocation as if it were a family council. Special inquiries are initiated by the arrest under Section 16 and held forthwith under Section 25 of the Immigration Act. If there is no arrest there is no inquiry. There was an arrest for violation of Section 50(b), remaining in Canada by stealth. There was no arrest for an inquiry as required by Section 16. The key words "for an inquiry", the arrest must be for an inquiry, Section 16 and forthwith thereafter under Section 25 of the Immigration Act, the inquiry must be caused to be held. Now, here after the man was imprisoned and while serving time, there was a letter of convocation - by what authority is there a letter of convocation? Section 16 and Section 25 expressly and clearly state where a person is arrested, not even detained is used, where a person is arrested pursuant to Section 16 an inquiry shall forthwith be held in the margin the word is interpreted as meaning immediate. Now a man is arrested, he is deprived of his liberty. He must be taken immediately, or forthwith, to a Special Inquiry Officer, who shall cause an inquiry to be held forthwith and grant him bail, which is discretionary, and hold the inquiry

Sections 16 and 25 of the Immigration Act read as follows:

Section 16. "Every constable and other peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue a warrant, order or direction for arrest or detention, arrest and detain for an inquiry or for deportation or both any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii), (viii), (ix) or (x) of paragraph (e) of subsection (1) of section 19."

Section 25. "Where a person is, pursuant to section 15 or 16 arrested with or without a warrant, a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person."

It must here be noted that in addition to a number of unspecified officials "every Immigration Officer may without the issue of a warrant for arrest or detention, arrest and detain for an inquiry."

Since the conjunction or is used in respect of the word arrest or detention without the issue of a warrant, in the opinion of the Board the section contemplates either the physical arrest with subsequent detention or merely detention for the purpose of an inquiry if there exists reasonable grounds to suspect that a person is one referred to in subparagraph (vii), (viii), (ix) and (x) of subparagraph (e) of subsection (1) of Section 19. "Reasonable grounds" are in this instance indisputable since the appellant was serving a sentence in Montreal Jail having been convicted of a violation of Section 50(b) of the Immigration Act upon evidence that he was a person described in subparagraph (x) of paragraph (e) of Section 19(1) of the said Act.

Counsel for the appellant in argument took exception to the conduct of the Court in this action.

Page 21 of the record of the Appeal Board hearing:

Mr. Law, Counsel for the respondent:

Well all I am saying is that the conviction is there.
If my friend wanted to appeal it, it was open to appeal and he didn't appeal.

Mr. Cohen:

It could be quashed at any time as an absolute nullity by certiorari.

The Board concludes, however, that this was a matter for determination by the Courts and only incidental to the appeal since the Special Inquiry Officer had established to its satisfaction the subject was a person referred to in Section 19(1)(e)(x) of the Act.

Counsel for the appellant, both in his initial presentation and his summation argued that the hearing before the Special Inquiry Officer was in contravention of Section 15(3) of the Immigration Act.

"Where the person concerned is an inmate of a penitentiary, gaol, reformatory or prison, the Minister shall, unless he approves of the issue of a warrant or order under subsection (1) or (2), issue an order to the warden, governor or other person in charge thereof commanding him, at the expiration of the sentence or term of imprisonment awarded to such person or at the expiration of his sentence or term of imprisonment as reduced by the operation of a statute or other law or by a valid act of clemency, to detain such person and deliver him to an immigration officer to take into custody and cause him to be detained as the warrant may direct."

Acceptance of such a theory, in the opinion of the Board would inevitably render a person, who, being in violation of subparagraph (vii), (viii), (ix) and (x) of paragraph (e) of subsection 1 of section 19 and otherwise detained, in a privileged position over one who is apprehended or about to be apprehended, only, for violation of this section. In this special situation a report under Section 19 would have to be made to the Director and at his discretion a directive issued for the convocation of an inquiry. On the other hand Section 16 provides the authority to apprehend or detain for a hearing while Section 25, a safeguard against undue detention provides for the immediacy of such proceedings.

In the instant case it must be noted that the appellant, while in fact was serving a three months sentence, his immediate release from prison may have been effected by satisfying the alternative sentence of \$300.00 fine. The directive or writ of detention addressed to the Superintendent of the Prison on the date of conviction therefore became imperative under the terms of Section 16, consequent upon the Immigration Officer receiving the information which provided reasonable grounds to suspect the person referred to, as being in violation of subparagraph (x) of paragraph (e) of subsection 1, Section 19.

Under the terms of Section 15(3) the Immigration Officer would be powerless to act with the expedition contemplated by the authority bestowed under Section 16 and the person described might have once again become a fugitive from the authority charged with the responsibility of enforcing the Immigration Act.

In addition Section 16 unquestionably authorizes an Immigration Officer to "arrest and detain for the purpose of an inquiry". Subsequent to the subject's arrest, conviction and incarceration, Immigration Officer P. de Montigny addressed an order for detention in accordance with the provisions of the Immigration Act to the Governor of Montreal Prison on a form, entered as Exhibit 4(a) of the records. The form #421, prescribed by the Minister, in its notation of sections 13 and 17 of the Immigration Act merely informed the Governor of his duties to detain the person named and that Montreal Prison was "a detention station satisfactory to the Minister".

Sections 13 and 17 read as follows:

"13. Every constable and other peace officer in Canada whether appointed under the laws of Canada or of any province or municipality thereof, and every person in immediate charge

or control of an immigration station shall, when so directed by the Minister, Deputy Minister, Director, a Special Inquiry Officer or an immigration officer, receive and execute, according to the tenor thereof, any written warrant or order made under the authority of this Act or the regulations for the arrest, detention or deportation of any person."

"17. Any person respecting whom an inquiry is to be held or a deportation order has been made may be detained pending inquiry, appeal or deportation at an immigrant station or other place satisfactory to the Minister."

Moreover, while a majority of the Board were prepared to concede that actual physical arrest had not taken place it is also of the opinion that the two verbs, "arrest" and "detain" are indeed synonymous. In any event and in this instance, the detention order made by Immigration Officer P. de Montigny under Section 16 implied an arrest and therefore Section 25 became applicable.

In support of such a contention we draw on Black's Law Dictionary definition of "detain" and Corpus Juris Secundum, 26A, in respect of "detainer".

"Detain: It has been said that the word "detain" is susceptible of many shades of meaning, and that the idea of force or even duress, threat, or menace can all be easily excluded and the word still be pregnant of meaning. The word includes the idea of delaying, hindering, retarding, etc., and is defined as meaning to hold or keep in custody; to restrain from proceeding; to arrest; to check; to delay; to hinder; to retard; to stay; to stop. "Detain" has been held synonymous with "retain" and, in the participial form applied to real estate, substantially synonymous with "withholding".

"Detainer. The act, or the juridical fact, of withholding the possession of land or goods from a person lawfully entitled thereto; or the restraint of a man's personal liberty against his will; detention. Also a writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. The term is also employed to denote one who has or possesses a thing in the name of another, as a pawnbroker, a depository, and others who may resort to the courts against those who disturb their detention."

Within the instant case, a detention notice addressed to the Governor of Montreal Prison in respect of Georgios Maroudas by Inquiry Officer P. de Montigny is admirably suited to such a construction.

The Board has also concluded that the argument that the mere admission into the record of a letter addressed by Counsel to the Inquiry Officer, some ten months subsequent to the departure of the ship, seeking approval to remain in Canada after the departure of the vehicle on which he came, constitutes approval of such request is a spurious argument unworthy of serious consideration.

In view of its findings on the foregoing points, a majority of the Board has reached a conclusion that the deportation order was a valid one and complied fully in "substance", with the terms of the Immigration Act. In the

de Marigny V Langlais, Can., (1948) S.C.R. Mr. Justice Kellock said: "In the administration of the Immigration Act what is to be looked for and required is a compliance in substance with its provisions".

The appeal is therefore dismissed.

Notwithstanding, the majority of the Board has come to a conclusion that this is an appropriate case for it to exercise its discretion under the authority given in Section 15(1)(b) to stay the order sine die and request the Department to process the appellant as a sponsored immigrant and report to the Board.

J.V. Scott, Chairman (dissenting):

The facts are as follows:

Mr. Maroudas, a 23 year old citizen of Greece, arrived at Carleton-sur-mer, Quebec, on or about June 1, 1967, as a member of the crew of the S.S. Mango. Around June 7, 1967, he left the ship on shore leave and proceeded to Montreal, where he took employment and remained. On March 21, 1968, he was arrested by an officer of the R.C.M.P., and on March 22, 1968, he was convicted in the Court of Sessions at Montreal, as shown on a certificate of judgement dated March 22, 1968, and filed with the Board as Exhibit A-2: "d'avoir ... entre le 15 juin 1967 et le 21 mars 1968, est illégalement demeuré au Canada par la ruse, commettant par là une infraction contrairement à l'article 50(b) de la Loi sur l'immigration, S.R.C. 1952, ch. 325". He was sentenced to a fine of \$300.00 or 3 months imprisonment. He was unable to pay the fine, and the same day, March 22, 1968, commenced serving his sentence in Montreal Prison.

Two documents in identical terms, dated the same day, signed by one P. de Montigny, fonctionnaire à l'immigration, one addressed to Le Directeur, Sûreté Provinciale, 1701 rue Parthenais, Montréal, Qué., and the other to Le Gouverneur, Prison de Montréal, 800 ouest, Boul. Gouin, Montréal, Qué., were filed with the Board as Exhibit A-4. The second of these documents bears the stamp of the Montreal Prison, showing receipt thereof on March 22, 1968. The body of both documents reads as follows:

"En conformité des dispositions de la Loi sur l'immigration, j'ordonne par les présentes que George MAROUDAS soit détenu immédiatement pour une enquête 26-5-45.

date 22 mars 1968

(signed)

P. de Montigny
Fonctionnaire à l'immigration

13. 'Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, de même que toute personne ayant la direction ou le contrôle immédiat d'une station d'immigrants doivent, s'ils en sont requis par le Ministre, le sous-ministre, le directeur, un enquêteur spécial ou un fonctionnaire à l'immigration, recevoir et exécuter, selon la teneur, tout mandat ou toute ordonnance, rendue par écrit sous l'autorité de la présente loi ou des règlements, en vue de l'arrestation, de la détention ou de l'expulsion de quelque personne."

15(1) 'Le Ministre peut émettre un mandat pour l'arrestation de toute personne à l'égard de laquelle un examen ou une enquête doit être tenue, ou à l'égard de laquelle une ordonnance d'expulsion a été rendue, en vertu de la présente loi.'

(2) 'Le Ministre, le sous-ministre, le directeur ou un enquêteur spécial peut rendre une ordonnance pour la détention de toute semblable personne, ou en prescrire la détention.'

17. 'Toute personne, à l'égard de laquelle une enquête doit être tenue ou une ordonnance d'expulsion a été rendue, peut être détenue en attendant l'issue de l'enquête, l'appel ou l'expulsion à une station d'immigrants ou à un autre endroit que le Ministre juge satisfaisant.'

FORMULE PRESCRITE PAR LE MINISTRE DE LA MAIN-D'OEUVRE ET DE L'IMMIGRATION"

Subsequently, a letter dated March 27, 1968, signed by J. Pépin, Special Inquiry Officer, was sent to the appellant in care of the Governor, Montreal Gaol, 800 Gouin Blvd West, Montréal, Qué., in the following terms:

"Dear Sir:

Please be advised that you are presently detained pursuant to Section 16 of the Immigration Act in that it is alleged that you are a person described under sub-paragraph (x) of paragraph (e) of sub-section (1) of Section 19 of the Immigration Act by reason of the fact that you came into Canada as a member of a crew and without the approval of an Immigration Officer remained in Canada after the departure of the vehicle on which you came into Canada.

In view of the above and in accordance with Section 25 of the Immigration Act a Special Inquiry Officer shall hold an Inquiry in your case and will question you in regards to the above allegations. The date and time set for this Inquiry to be held is 9:30 A.M. on Thursday, April 4, 1968. If the Special Inquiry Officer establishes during the Inquiry that you are a person described as above an order for deportation may be made against you.

In accordance with subsection (2) of Section 27 of the Immigration Act any person who is the subject of an Inquiry under the said Act has the right to be represented by counsel at the Inquiry. Attached hereto please find a notification informing you of your rights to counsel.

When you present yourself before the Special Inquiry Officer please carry this letter as well as the attached notification.

We have been given to understand that you have a girl friend in Canada who has contacted Me B.B. Cohen, Advocate, to submit representations on your behalf therefore by copy of this letter Me Cohen is being informed of the date and time set for this Inquiry.

Yours truly,

J. Pépin (signed)
Special Inquiry Officer,
Canada Immigration Divison".

This letter was filed as Exhibit B to the Minutes of Inquiry.

On April 4, 1968, Mr. Florian Vallée commenced the inquiry at Montreal Gaol, and stated (at page 2 of the Minutes of inquiry) "Mr. Maroudas, you are detained for an Inquiry pursuant to Section 16 of the Immigration Act which states that:

"Every constable and other peace officer in Canada whether appointed under the laws of Canada or of any province or municipality thereof, and every Immigration Officer may, without the issue of a warrant, order or direction for arrest or detention arrest and detain for an Inquiry or for deportation or both, any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii) (viii) (ix) or (x) of paragraph (e) of subsection (1) of section 19".

- Mr. Maroudas, section 25 of the Immigration Act requires that when a person has been detained under these circumstances that an Inquiry be held immediately. I am now going to hold such an Inquiry and the specific section of the Act which I will consider in connection with your case is section 19 (1)(e)(x) of the Immigration Act which refers to persons who are not Canadian citizens or persons who do not have Canadian domicile and who

"came into Canada as a member of a crew and, without the approval of an Immigration Officer, remain in Canada after the departure of the vehicle on which they came into Canada" and I paraphrase "Such a person is subject to deportation".

Further reference to these sections was made by the Special Inquiry Officer at the adjourned inquiry, on April 16, 1968 (see pp. 7 & 8 of the Minutes). The inquiry was further adjourned and hearings also took place on May 6, 9 and 13. The Deportation Order was made May 13, 1968; at which time Mr. Maroudas was still serving his sentence in Montreal jail. He was released on June 7, 1968, having served his sentence in full.

On May 13, 1968, just before rendering his decision, Mr. Vallée was asked by Me Cohen, counsel for Mr. Maroudas:

BY COUNSEL:

- Would you complete an application for financial assistance and an application for bail pending appeal?

BY SPECIAL INQUIRY OFFICER

- I would like to explain to you, Me Cohen and Mr. Georgios Maroudas, that in order that your application for release from detention could be considered by the Immigration Appeal Board, that you must submit a written submission. Furthermore, I would like to inform you that your written submissions must be accompanied by an IAB form 48. At the expiration of the sentence of Mr. Maroudas at the present Montreal Gaol he will be then detained by Immigration Authorities and only at that

time that his application to be released pending the outcome of his appeal will be considered because when he will be released from Montreal Gaol he will be then transferred to our services meaning the Immigration services for detention and his bail to be released is hereby denied for the following reasons: 1) that he had not surrendered voluntarily but had to be apprehended; 2) that he has no relatives in Canada; 3) if released from custody he might abscond."

Mr. Maroudas was released by the Immigration authorities after signature of a Bond for conditional release by his fiancée, Miss Bernice Chandler, dated June 7, 1968.

Me Cohen argued before the Board, among other things, that the inquiry, and by implication, the deportation order, were null and void. He stated: "Special inquiries are initiated by the arrest under Section 16 and held forthwith under Section 25 of the Immigration Act. If there is no arrest for violation of Section 50(b) remaining in Canada by stealth. There was no arrest for an inquiry as required by Section 16. The key words "for an inquiry", the arrest must be for an inquiry, Section 16 and forthwith thereafter under Section 25 of the Immigration Act, the inquiry must be caused to be held. Now, here after the man was imprisoned and while serving time, there was a letter of convocation - by what authority is there a letter of convocation?" Mr. Law, counsel for the respondent, stated in reply to this argument: "Now the Special Inquiry Officer conducted this inquiry on the ground that the appellant was detained pursuant to Section 16 of the Immigration Act and the inquiry was conducted in accordance with Section 25. Perhaps the more appropriate procedure to have followed would have been for some proper person to make a report under Section 19 of the Immigration Act but I do not think it can be seriously contended that the appellant was in any way jeopardized by the method by which the inquiry was convened. The fact is that the appellant was in jail which is not an impediment to holding an inquiry and I submit that it, shall we say rather perhaps unusual approach in this case, in no way vitiates the order which was ultimately made. Now, ...

CHAIRMAN:

You are saying the inquiry is not a nullity merely because the thing that activated it was possibly improper?

MR. LAW:

That is right. The fact is the man was in jail as I indicated and possibly a report under Section 19 might have been the more appropriate action to take. The fact is that the Special Inquiry Officer, who I understand from my friend is named Pépin, wrote a letter informing Mr. Maroudas that he was being detained under Section 16 and if he had originally been free he could have been detained under that section no doubt.

CHAIRMAN:

But he was not.

MR. LAW:

He was informed that he was being detained in prison under Section 16.

CHAIRMAN:

I think this goes to the root of the whole thing. The Special Inquiry Officer has general powers under Section 11 but something has to start the inquiry, it is either a 19 report, 23 report, arrest under 15, or arrest under 16.

MR. LAW:

Yes, and I am saying that what the Special Inquiry Officer has done, he has said to the man who is in jail and who is in any event being already detained, that he is now being detained in effect, not only pursuant to the jail sentence which he is under but also pursuant to the provisions of the Immigration Act. Now I would like to refer the Board to In re JANOCZKA, (1932) 3 W.W.R., page 29, which is a decision of the Manitoba Court of Appeal. Mr. Justice Robson referred to Section 42 of the Immigration Act as it then was. Now Section 42 reads as follows; or read as follows, at that time:

"Upon receiving a complaint from any officer or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or Deputy Minister may order such person to be taken into custody and detained at an immigration station for examination and an investigation of the facts alleged in the said complaint to be made by a board of inquiry or by an officer acting as such."

And then at page 31 of the report, Mr. Justice Robson said:

"I read the words authorizing detention at an immigration station as being authority to detain where the immigrant is not already under detention and as not applying to the case of a person already being an inmate of a jail."

I submit, under these circumstances, the letter, I suppose, is almost redundant but what the Immigration Officer has done in this case was attempt to retain, or detain, the appellant while he is already under detention. In any event, the de MARIGNY v. LANGLAIS, (1948) S.C.R., Mr. Justice Kellock said:

"In the administration of the Immigration Act what is to be looked for and required is a compliance in substance with its provisions"

The case SAMEJIMA v REX shows that "this court will not hesitate to condemn hugger-mugger proceedings as Sir Lyman Duff called them or proceedings which have a defect in substance or in which a defect in substance appears." Now I submit there is no defect in substance insofar as this inquiry was concerned. The fact is the appellant was in jail, he was told that an inquiry was going to be conducted, he was not going any place for three months and he had counsel present at all times. He was told precisely what the inquiry entailed and what would result, or what the result would be, if certain things were found and as is quite apparent from the transcript of the minutes of this inquiry the appellant's interests were energetically being defended and I submit that there is no ground for suggesting that the Special Inquiry Officer did not have jurisdiction."

From a reading of the Immigration Act as a whole, it is clear that despite the general authorization given to a Special Inquiry Officer by Section 11 in respect of inquiries, he has no power to commence an inquiry except pursuant to Section 23, Section 24, Section 19 in conjunction with Section 26, or Section 15 or Section 16 in conjunction with Section 25. The inquiry in the instant case purported to be held pursuant to Sections 16 and 25, above quoted. Section 16 empowers an immigration officer, among others, without warrant, to "arrest and detain for an inquiry or for deportation or both any person ... referred to in subparagraph ... (x) of paragraph (e) of subsection (1) of Section 19." Section 25 provides that where a person is, pursuant to Section 16, arrested without a warrant, a Special Inquiry Officer "shall forthwith cause an inquiry to be held ..."

It is clear from the evidence before the Board that Mr. Maroudas was not arrested and detained for an inquiry. He was arrested, detained, charged, and convicted for an offence under the Immigration Act, namely that described in Section 50(b) thereof.

The wording "arrest and detain for an inquiry" in Section 16 must be read conjunctively. In Maxwell on Interpretation of Statutes, Eleventh Edition, the learned authors, at page 229, ff, state "to carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions 'or' and 'and' one for the other ... This substitution of conjunctions, however, has been sometimes made without sufficient reason, and it has been doubted whether some of the cases turning 'or' into 'and' and vice versa, have not gone to the extreme limit of interpretation ... It has been said that in a penal statute 'or' should only be changed into 'and' or vice versa if the result is more favourable to the subject, but there is no rule of law to that effect." Later in the same work, at page 255, we find "Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language." A penal statute is one which imposes a penalty or forfeiture (Osborne's Law Dictionary, Fifth Edition). The consequences of deportation, though possibly not falling directly within this definition, are so serious that in the Board's opinion the Immigration Act should be construed strictly, as if it were a penal statute.

The document signed by Officer de Montigny, dated March 22, 1968, would appear to be meaningless. This purports to be an order that George Maroudas be detained immediately for an inquiry. It makes no mention of Section 16 and since the detention purportedly ordered was not coupled with an arrest under that section, it has no possible relevance to Section 16. If, as appears more likely from the sections quoted at the bottom, the document purports to be an order pursuant to Section 15(2), Officer de Montigny had no authority to make it.

Section 15(2) reads as follows:

"The Minister, Deputy Minister, Director or a Special Inquiry Officer may make an order for the detention of or direct the detention of any such person."

Officer de Montigny, described as "fonctionnaire à l'immigration" does not fall within any of the categories of persons authorized by the subsection to make an order of detention. Furthermore, the use of the words "such person"

in Section 15(2) indicates that the subsection must be read in conjunction with Section 15(1), which provides "The Minister may issue a warrant for the arrest of any person respecting whom an examination or inquiry is to be held or a deportation order has been made under this Act." There was no such warrant of arrest in the case before us.

Mr. Pépin's letter of March 27, 1968, and Mr. Vallée's remarks at the beginning of the inquiry, in respect of Sections 16 and 25, cannot be construed as vesting jurisdiction in Special Inquiry Officer Vallée, since such jurisdiction did not in fact exist within the plain meaning of these sections. The purport of Section 16 is clear - it permits the arrest and detention for the purpose of an inquiry of a person not already arrested and detained pursuant to some other provision of the Act or some other statute. This view is supported by the remarks of Robson J. quoted by Mr. Law in respect of a section, generically similar, found in an earlier version of the Act. "I read the words authorizing detention at an immigration station as being authority to detain where the immigrant is not already under detention and as not applying to the case of a person already being an inmate of a jail."

As noted above, the Immigration Act must be strictly construed. The authority designated to administer the Act, namely the Minister and his staff, must follow the correct procedures laid down therein, in commencing, pursuing and concluding an inquiry or further examination which may result in an order for deportation. In the instant case, the inquiry should have been authorized under Section 26 following a report under Section 19(1).

Since neither Section 15 nor Section 16 were applicable in the case of the present appellant, Section 25 is inapplicable. It is clear from the Immigration Act as a whole that a deportation order must be preceded by a properly constituted inquiry (except in certain situations clearly specified by the Act, none of which are relevant here). Since the inquiry in the instant case was not properly constituted, despite the valiant efforts of Messrs. Pépin and Vallée to bring it within the provisions of Sections 16 and 25, the deportation order flowing from it is a nullity, and the appeal must be allowed.

In view of the above finding, it is not necessary to deal with the other legal arguments ably made by counsel for both parties.

Had I been of the opinion that the appeal should be dismissed, I would have agreed with my learned colleagues, Messrs. Byrne and Legaré, that this was an appropriate case for special relief pursuant to the powers given to the Board by section 15 of the Immigration Appeal Board Act as set out in the last paragraph of Mr. Byrne's reasons for judgement.

Counsel:

For the appellant: B. Benno Cohen, Q.C., Barrister and Solicitor

For the respondent: R.W. Law, Barrister and Solicitor,
Department of Justice

Georges PATRINOS, appellant and

The Minister of Manpower and Immigration, respondent

Decision: September 30, 1968

(File: 68-5662)

Coram: J.C.A. Campbell, Vice-chairman, F. Glogowski, J.A. Byrne

Two orders of deportation - Jurisdiction of the Board to go behind the second order and examine the first order to see if there were grounds to support the first order. - Immigration Act: 19(1)(e)(ix). - Immigration Appeal Board Act: S. 11; 22. - Jurisprudence.

Deux ordonnances d'expulsion. - Compétence de la Commission d'aller en-deçà de la première ordonnance et d'examiner si celle-ci était fondée. - Loi sur l'immigration: 19(1)(e)(ix) - Loi sur la Commission d'appel de l'immigration: Art. 11; 22. - Jurisprudence.

Held:- The Board had jurisdiction to go behind the second order and examine the first order to see if there were grounds to support the first order. On the facts, the first order in the instant appeal was null and void. Section 5(t) of the Immigration Act being totally inapplicable to the circumstances proved, the second order was therefore a nullity, and the appeal was allowed and an order was made pursuant to Section 14(c) of the Immigration Appeal Board Act, entering the appellant as a non-immigrant.

Arrêt:- La Commission avait compétence pour aller en-deçà de la première ordonnance d'expulsion et de juger du bien fondé de celle-ci. En fait, la première ordonnance était nulle et de nul effet. L'article 5(t) de la Loi sur l'immigration, vu les circonstances pertinentes, ne recevait aucune application et en conséquence, la seconde ordonnance était nulle. Appel accueilli et une ordonnance de recevoir l'appelant au titre de non-immigrant fut émise en vertu de l'article 14(c) de la Loi sur la Commission d'appel de l'immigration.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.C.A. Campbell:-

The order of deportation reads:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (ix) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act and that you return to or remain in Canada after a deportation order was made against you at Windsor, Ontario on the 2nd of February 1968 and since no appeal against such order was allowed and were deported or left Canada since you do not

have the consent of the Minister contrary to the provision of Section 38 of the Immigration Act.

- 4) you are subject to be deported in accordance with subsection 2 of Section 19 of the Immigration Act."

The relevant facts in the case are not in dispute. The appellant is a Greek citizen by birth on 5 September 1934. He is married and has three children. His wife and family live in Greece. He is a musician and has followed his profession in several countries including the United States and Canada. He applied for permanent residence in the United States but was requested to leave that country. In February 1968 he obtained a contract to work as an entertainer in the Elatos Café in Montreal and a cash bond in the amount of \$500.00 was deposited at that time with the Immigration office in Montreal. When he presented himself at Windsor, Ontario, to seek admission to Canada to fulfil his contract he was refused admission and a deportation order (Exhibit "B") was issued. He did not appeal the deportation order and returned to the United States. Three days later he left the United States for Switzerland.

While he was in Switzerland the owner of the Athenian Corner Club in Montreal applied for his admission to Canada as an entertainer and deposited a \$500.00 cash bond with the Immigration authorities in Montreal. The contract was approved and the appellant in Switzerland obtained a tourist visa for Canada instead of a visa as an entertainer.

The appellant did not disclose the fact he had previously been ordered deported to either the Canadian authorities in Switzerland or to the Immigration authorities when he arrived at Montreal on 28 March 1968. He was admitted to Canada as a non-immigrant (tourist) under the provisions of Section 7(1)(c) of the Immigration Act until the 28th of June 1968.

Before the expiration of his status as a tourist he applied to the Immigration authorities in Montreal for an extension of his status as an entertainer at which time it was discovered that he had been ordered deported at Windsor, Ontario, in February 1968 and did not have the consent of the Minister as required by Section 38 of the Immigration Act to return to Canada. Section 38 reads as follows:

"38. Unless an appeal against such order is allowed, a person against whom a deportation order has been made and who is deported or leaves Canada shall not thereafter be admitted to Canada or allowed to remain in Canada without the consent of the Minister."

As a result of an Inquiry the appellant was ordered deported on 15 July 1968 under the provisions of Section 19(1)(e)(ix) of the Immigration Act which reads:

"19(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning

- (e) any person, other than a Canadian citizen or a person with Canadian domicile, who
 - (ix) returns to or remains in Canada contrary to the provisions of this Act after a deportation order has been made against him or otherwise."

Following the issuance of the said deportation order he appealed to the Immigration Appeal Board.

Counsel for the appellant attacked the validity and legality of the deportation order on two grounds:

- (a) That the deportation order dated 2 February 1968 made against the appellant was not valid and consequently the second order of deportation dated 15 July 1968 is also not valid.
- (b) The appellant was denied natural justice at the further examination conducted at Windsor, Ontario, on 2 February 1968.

In support of the first ground appellant's counsel argued that at the time the appellant presented himself and was examined at Windsor, Ontario, he was a bona fide non-immigrant as he had in his possession a properly signed contract of employment showing he was to be employed as an entertainer in Canada and that his proposed employer had deposited the required \$500.00 cash bond with the Immigration authorities in Montreal. Furthermore Section 5(t) of the Immigration Act coupled with Section 67 of the said Act was not a valid ground in the said deportation order of 2 February 1968 and did not apply to the appellant as the Immigration Officer at Windsor who conducted the further examination knew or should have known that a \$500.00 bond was on deposit with the Immigration office in Montreal. Furthermore the evidence adduced at the Inquiry held on 17 July 1968 (Page 9) showed that the appellant had not been asked to deposit any money in order that he might be admitted to Canada. He was only asked how much money he had in his pocket at the time he sought admission. The relevant question and answer is as follows:

"Q. Do you recall that the Immigration Officer, who first examined you at Windsor, requested you to deposit money in order for you to be admitted in Canada regardless of the bond that was deposited in your behalf by Mr. Konidas?

A. No, he only asked me how much money I have in my pocket."

Section 5(t) of the Immigration Act reads as follows:

- "5. No person, other than a person referred to in subsection (2) of section 7, shall be admitted to Canada if he is a member of any of the following classes of persons:
 - (t) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders lawfully made or given under this Act or the regulations."

Section 67 of the Immigration Act is as follows:

- "67(1) The immigration officer in charge at a port of entry may require any non-immigrant or group or organization of non-immigrants arriving at such port to deposit with him

such sum of money as he deems necessary as a guarantee that such non-immigrant or group or organization of non-immigrants will leave Canada within the time prescribed by him as a condition for entry.

(2) Where the non-immigrant or group or organization of non-immigrants fails to leave Canada within the time prescribed, the immigration officer in charge may order that the sum of money so deposited be forfeited and thereupon it is forfeited and where the person or persons concerned leave Canada within the prescribed time the money deposited shall be returned, less any expenses for detention, maintenance, treatment or transportation or otherwise incurred by Her Majesty respecting such person or persons or any of them."

In support of his second argument, namely that natural justice had been denied the appellant, Mr. Landry argued that the appellant at the further examination held at Windsor, Ontario on 2 February 1968 was denied the right to counsel and also the right to appeal. The right to counsel, he argued, is provided for in Article 3 of the Immigration Inquiries Regulations. That article reads as follows:

- "3. At the commencement of an inquiry where the person in respect of whom the inquiry is being held is present but is not represented by counsel, the presiding officer shall
- (a) inform the said person of his right to retain, instruct and be represented by counsel at the inquiry; and
 - (b) upon request of the said person, adjourn the inquiry for such period as in the opinion of the presiding officer is required to permit the said person to retain and instruct counsel."

As no counsel was present there was no proper inquiry or alternatively if what had taken place could be construed as being an inquiry then it was held illegally. Therefore the deportation order of 2 February 1968 is automatically null, illegal and void. That being so there was no need for the appellant to make a request to the Minister of Immigration for a visa. If the first deportation order (i.e.) 2 February 1968 is null, ab initio, it follows that the second order dated 15 July 1968 is also null and void as it is based upon the first order.

Counsel for the appellant also contended that whenever a deportation order is likely to be issued the person concerned is entitled to have counsel present. It does not make any difference whether the examination of the person concerned is by way of a further examination or an Inquiry.

Counsel for the appellant drew the Board's attention to the qualifications of the appellant as an entertainer as they appear at pages 6 and 7 of the Inquiry. He referred the Board to its powers under Section 15(1) of the Immigration Appeal Board Act and requested the Board to grant the right of entry to the appellant.

Counsel for the Minister, in rebuttal, referred the Board to Section 38 of the Immigration Act (already referred to) and argued that as the appellant had not appealed the order of 2 February 1968 its validity could not

now be re-tried. He submitted further that the Board should not exercise its discretion in this case as, in his understanding, the appellant was seeking admission to the United States and using Canada as a stopping point. He argued that Canada should not be used as a spring-board for such an endeavour.

The first question the Board has to resolve is whether it has the legal authority to go behind the order under appeal and examine the deportation order of 2 February 1968 to ascertain if there was evidence to support the grounds set out in the said order.

The Immigration Appeal Board is a creature of Statute and its powers and jurisdiction must be found within the Statute that created it. Section 22 of the Immigration Appeal Board Act states:

"22. Subject to this Act and except as provided in the Immigration Act, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for the admission to Canada of a relative pursuant to regulations made under the Immigration Act."

The above quoted Section gives the Board the sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation. When this section is read in conjunction with Section 11 of the said Act, Which reads:

"11. A person against whom an order of deportation has been made under the provisions of the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact."

It is apparent the Board has the jurisdiction and is entitled to go behind the deportation order of 15 July 1968 and look at and examine the facts leading up to the making of the deportation order dated 2 February 1968.

While the Appeal Board is not bound by a decision of a Provincial Court it might be helpful to see the approach taken by the Manitoba Courts in a somewhat similar case, that of King v. Brooks and the Minister of Citizenship and Immigration (1960) 31 W.W.R. 673.

King (the applicant) moved for an order of certiorari to review two deportation orders made against him on 9 June 1958 and 29 July 1959 respective. The order of certiorari was granted by Monnin J., on 25 February 1960. On 22 March 1960 a further application was made for a better return and on 21 April 1960 Monnin J., ordered that the return be completed by including the Minutes of the Inquiry setting out the evidence adduced and the exhibits filed at the Inquiries held on 9 June 1958, and 28 and 29 July 1959. The two orders were as follows:

"Mr. James Larry King or Henry Franklin Romine or Cummins, on the basis of the evidence adduced at this Inquiry I have reached the decision that you may not come into or remain in Canada as of right and that

- (i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under sec. 19(1) (e)
 - (iv) of the Immigration Act in that you were, at the time of your admission to Canada as an immigrant on November 18, 1957, a member of the prohibited class designated by subsec. (d) of sec. 5 of the said Act.
- (iv) you are subject to deportation in accordance with sec. 19 of the Immigration Act.

I hereby order you to be detained and to be deported. Your dependent wife, Norma Jean King, your dependent children, Cheryl Rae, Franklin Hugheston, and Garrison Richard King, and your dependent foster father, Augustus Wendell, are included in this Order for Deportation under the provisions of sec. 37(1) of the Immigration Act.

Q. Mr. King, do you understand what is meant by this decision?
A. Yes.

June 9, 1958.

(Sgd.) A.E. BROOKS,
Special Inquiry Officer."

"Mr. King, on the basis of the evidence adduced at this Inquiry I have reached the decision that you may not come into or remain in Canada as of right and that

- (i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under sec. 19(1) (e)
 - (ix) of the Immigration Act in that you returned to and remain in Canada contrary to the provisions of the Immigration Act after a deportation order has been made against you or otherwise,
- (iv) you are subject to deportation in accordance with sec. 19 of the Immigration Act.

I hereby order you to be detained and to be deported.

Q. Do you understand what is meant by this decision?
A. Yes.

July 29, 1959.

(Sgd.) A.E. BROOKS,
Special Inquiry Officer."

Monnin J., in his judgment said, inter alia, "The evidence has now been filed and it was necessary that I peruse it to dispose of the applicant's contention". Further on in his judgment Monnin J., posed the applicant's case

in the following words: "Applicant's case rests on whether the order of June 9, 1958, can be quashed or not because if it is found valid the order of July 29, 1959, which is based on the first, is of necessity valid." After reviewing the evidence Monnin J., stated "The order of June 9, 1958, is valid and, therefore, the order of July 29, 1959, based on it is likewise valid."

He therefore dismissed the application for certiorari. An appeal from the decision of Monnin J., was taken to the Manitoba Court of Appeal. On 25 October 1960 the appeal was dismissed.

It can be seen therefore that the Manitoba Court had no hesitation, on a certiorari application, in going behind the second order made against King, i.e., the order of 29 July 1959 and looking at all the circumstances leading up to the making of the first order of 9 June 1958.

In the instant case when the appellant sought admission to Canada on 2 February 1968 at Windsor, Ontario, he was in possession of a three months' contract to work as an entertainer at the Elatos Café in Montreal and his prospective employer had deposited a \$500.00 cash bond with the Immigration authorities in Montreal. There is nothing in the evidence adduced at the Inquiry to support an opinion that the appellant was seeking to use Canada as a "stopping place" in order to return to the United States as was suggested by counsel for the respondent.

Therefore the Board finds that the Special Inquiry Officer was manifestly wrong when he stated in the deportation order of 2 February 1968 that "in my opinion you are not a bona fide non-immigrant" and that portion of the said deportation order is therefore invalid.

The uncontradicted evidence in the Inquiry shows that the appellant was never required or requested to deposit a sum of money in accordance with the provisions of Section 67 of the Immigration Act. He was only asked how much money he had in his pocket (Page 9). The Board finds therefore the second ground set out in the deportation order of 2 February 1968 is also invalid. As both grounds in the said deportation order are invalid the appeal must be and is hereby allowed.

The Board having allowed the appeal for the reasons given above, it is not necessary to deal with the other arguments of counsel for the appellant.

Counsel for the appellant requested the Board to grant the appellant the status of entertainer in Canada. Therefore, pursuant to Section 14 (c) of the Immigration Appeal Board Act, the Board hereby orders that the appellant be permitted to enter and remain in Canada under the provisions of Section 7(1)(g) of the Immigration Act for a period to expire on the 31st day of December 1968.

Counsel:

For the appellant: M. Landry, Barrister and Solicitor

For the respondent: D. Kilgour, Barrister and Solicitor

Mark Alexander CHLOROS)
 Charles Dede THOMAS) appellants and
 Jerry Wayne BARNES)
 Michael Alfred CARRIEN)

The Minister of Manpower and Immigration, respondent

Decision: October 28, 1968
 (68-5799, 68-5800, 68-5819, 68-5820)

Coram: A.B. Weselak, G.Legaré, J.-P. Houle

Port of entry - Eluding examination - Immigration complaint and criminal indictment -
 Duplicity of charges. - Mens rea - Immigration Act, not a penal statute -
 Immigration Act: S. 16; 19(1)(e)(vii); 19(2); 25; 50(a) - Immigration Appeal
 Board Act: 14(b); 15.

Port d'entrée. - Se soustraire à l'examen - Plainte en vertu de la Loi sur
 l'immigration et accusation selon le droit pénal - Duplication des chefs d'accusa-
 tion - Mens rea - La Loi sur l'immigration n'est pas une loi pénale.- Loi sur
 l'immigration: Art. 16; 19(1)(e)(vii); 19(2); 25; 50(a) - Loi sur la Commission
 d'appel de l'immigration: Art. 14(b); 15.

Held: Immigration Act complaint and a criminal indictment are not the same, and
 a duplicity of charges is a criminal matter only. - Immigration Act is not a
 penal statute, and where the protection of the public interest is involved, and
 where there is also a penal Section for the same offence in the Act, mens rea is
 not an essential element.

Arrêt: Une plainte portée en vertu de la Loi sur l'immigration ne peut être
 assimilée à une accusation selon le droit pénal et la duplication des chefs
 d'accusation ne peut avoir lieu qu'en matière pénale. - La Loi sur l'immigration
 n'est pas une loi pénale et la mens rea n'est pas un élément essentiel lorsqu'il
 s'agit de protéger l'intérêt public et aussi lorsqu'il y a dans la Loi, un
 article de portée pénale pour la même offence.

Le jugement de la Commission fut rendu par:
 The judgment of the Board was delivered by:

A.B. Weselak:-

Consolidation of appeals in identical terms as follows:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile; and that
- 3) you are a person described under subparagraph (vii) of
 paragraph (e) of subsection (1) of Section 19 of the
 Immigration Act, in that you came into Canada at a place
 other than a Port of Entry and eluded examination under
 this Act,

- 4) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act."

The appellants had gathered at Rangely in the State of Maine and had planned, with the aid of maps, the trip to Canada. They left Rangely, approximately fifty miles from Canadian Customs, on August 25, 1968 and obtained a ride from Rangely Airport to Big Falls, Maine. They left Big Falls the same day and spent two days on gravel and bush roads travelling through the bush.

Counsel for the Appellants challenged the validity of the order on three grounds:

- (1) That the third ground in each of the deportation orders created one offence of "entry" and "eluding" whereas the Immigration Act in Section 19(1)(e)(vii) created two grounds for deportation and therefore the ground was bad for duplicity and therefore is objectionable.
- (2) That the doctrine of mens rea should apply when the Board considers the allegation that the appellants came into Canada "other than at a port of entry".
- (3) That the appellants did not in fact "elude examination under the Act".

The appellants were formally arrested on August 26 and formally advised by the arresting officer that they were being arrested under Section 16 of the Immigration Act which provides:

"16. Every constable and other peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue of a warrant, order or direction for arrest or detention, arrest and detain for an inquiry or for deportation or both any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii), (viii), (ix) or (x) of paragraph (e) of subsection (1) of section 19."

Section 25 of the Immigration Act requires that when a person is arrested in accordance with Section 16 of the Immigration Act, a Special Inquiry Officer shall cause an Inquiry to be held forthwith concerning the person. An Inquiry was held in the case of each of the appellants and in each case the Special Inquiry Officer read to the appellant the provisions of Section 19(1)(e)(vii) of the Immigration Act which reads as follows:

"19.(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning

(e) any person, other than a Canadian citizen or a person with Canadian domicile, who

(vii) came into Canada at any place other than a port of entry or eluded examination or inquiry under this Act or escaped from lawful custody or detention under this Act."

As a result of the Inquiry a deportation order was issued in each case the third ground of each order reading:

"3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, in that you came into Canada at a place other than a Port of Entry and eluded examination under this Act."

Counsel for the appellant objected to the substitution of the word "and" in the order for the word "or" in the statute contending that two offences in the statute were described as one offence in the order, and therefore the order was bad for duplicity. Counsel cited Tremear, Sixth Edition, at Page 1483 and in particular the case of R. v. Archer, (1955) S.C.R. 33, as her authority

The Board has considered the authorities cited by counsel and finds that these authorities deal with criminal charges upon the validity of which the Criminal Courts found their jurisdiction.

In R. v. Vaaro, (1933) S.C.R. 36 at 42, Lamont, J., stated:

"There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge. The King v. Jeu Jang How (1919) 59 Can. S.C.R. 175. In the latter case the Crown cannot compel the accused to go into the witness box and answer all questions put to him while, under the Immigration Act, the immigrant is detained "for examination and an investigation" into the facts alleged, and he must answer the questions put to him. (Section 33(2) and section 42(2).) The object of making provision for a Board of Inquiry is to have at hand a tribunal which can without delay inquire into the truth of the allegations made in the complaint. In many cases the immigrant himself must necessarily be the chief witness."

In R. v. Alamazoff 3 W.W.R. 281, an application for bail pending inquiry under "The Immigration Act", Mathers, C.J.K.B., stated at Page 282;

"The application is based both on the common law and on sec. 3 of The Habeas Corpus Act, 31 Car. II., ch. 2.

That Act only applies where the person seeking its aid

"shall be committed for any crime (unless for treason or felony) in vacation time and out of term." Counsel for the applicants argued that these deportation proceedings are

criminal in their essence because there is first a charge then an order for arrest followed, if found guilty, by a sentence of deportation. I have found no English or Canadian authority on the point, but a consideration of the purpose of the Immigration Act convinces me that proceedings for the deportation of an undesirable alien are in no sense criminal proceedings and that a person arrested and detained for such purpose is not "committed for any crime" within the meaning of The Habeas Corpus Act. The object and purpose of the proceedings is not to punish for an offence against the law of Canada. It is to ascertain whether or not the conditions upon which the alien was permitted to enter and reside in Canada have been complied with by him or whether they have been broken."

The Board can find no analogy between an information and a deportation order, the jurisdiction of the Special Inquiry Officer to hold an Inquiry is not dependant upon the deportation order, the order is the result of the Inquiry. The proceedings in this case were commenced by an arrest under Section 16 of the Immigration Act, after which they were detained for an inquiry as they were on reasonable grounds suspected of being persons referred to in subparagraph (vii), (viii), (ix) or (x) of paragraph (e) of subsection 1 of Section 19.

Section 25 of the Immigration Act reads as follows:

"25. Where a person is, pursuant to section 15 or 16, arrested with or without a warrant, a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person."

The jurisdiction of the Special Inquiry Officer to hold an Inquiry under Section 16 is not dependant upon any written or formal report or information; it follows upon an arrest and detention under Section 16 as Section 25 directs "a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person".

The pertinent section of the Act was read to the appellants at the Inquiries and as a result the Board finds that the proper procedure was followed and that the rights of the appellants were not prejudiced in any way and that the Inquiries were proper Inquiries.

The second ground for appeal raised by Counsel for the appellants was the contention that mens rea was an essential element in the allegation that each of the appellants came into Canada at any place other than a port of entry. The evidence clearly reveals that they did as a fact come into Canada at other than a port of entry, the question remains "is mens rea an essential element".

The Courts have held that in the cases cited (supra) that the Immigration Act is not a penal statute. Therefore we must look at the Act and its purpose to determine whether mens rea is an essential element. The rule is stated in Tremmear's Annotated Criminal Code, Sixth Edition at Page 20

"While an offence of which mens rea is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention."

and further down on Page 20

"The effect of the English decisions was summarized by Wright, J., in Sherras v. DeRutzen, (1895) 1 Q.B. 918, 18 Cox C.C. 157: "Apart from isolated and extreme cases ***the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which *** are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. *** Another class comprehends some, and perhaps all, public nuisances. *** Lastly, there may be cases in which, although the proceeding is criminal in form it is really only a summary mode of enforcing a civil right"."

also on Page 21

"The statute (the Weights and Measures Act, R.S.C. 1927, c. 212, s. 63) is for the protection of the public and with respect to such enactments, as well as those relating to the revenue, the sale of intoxicating liquors, and most, if not all of those containing prohibitions not falling within the proper domain of criminal law, the general rule is, contrary to the common law, that mens rea is not a necessary ingredient of the offence."

Section 50 of the Immigration Act provides:

"50. Every person who

- (a) comes into Canada at any place other than a port of entry and fails to report to an immigration officer for examination is guilty of an offence and is liable on summary conviction, for the first offence to a fine not exceeding five hundred dollars and not less than fifty dollars or to imprisonment for a term not exceeding six months and not less than one month or to both fine and imprisonment, and, for the second offence to a fine not exceeding one thousand dollars and not less than one hundred dollars or to imprisonment for a term not exceeding twelve months months and not less than three months or to both fine and imprisonment, and, for the third or a subsequent offence to imprisonment for a term not exceeding eighteen months and not less than six months."

The appellants were charged under Section 50(a), were found guilty and fined \$50.00 each or one day in jail.

One of the purposes of the Immigration Act is to protect the public and the public interest, to prevent indiscriminate entry into this country of among other persons, of undesirables or people of questionable moral character. It has been held repeatedly that where the public interest is involved, and particularly where the offence is also in the statute punishable by a fine or imprisonment that if the offence has been committed in fact that mens rea is not an essential element.

The Board finds that this is so in the case of each of the appellants and finds that the absence of mens rea does not invalidate the ground in the order relating to the coming into Canada at any place other than a port of entry. The Board therefore does not find it necessary to determine whether the appellants had this intent or not.

The Board finds this ground of the orders valid and having found this ground to be valid it finds it unnecessary to determine whether they eluded examination under the Act.

The Board therefore finds that the orders are valid and legal and made in accordance with the Immigration Act and Regulations thereunder and dismisses the appeals under Section 14 of the Immigration Appeal Board Act.

With regard to the discretionary powers under Section 15 of the Immigration Appeal Board Act, the Board has carefully considered the evidence before it, together with the submissions of counsel, and it cannot find such compassionate or humanitarian considerations which in its opinion would warrant the granting of such special relief as provided for in the Immigration Appeal Board Act. It therefore directs that the deportation orders be executed as soon as practicable.

Counsel:

For the appellants: J. Veit, Barrister & Solicitor

For the respondent: P. Betournay, Barrister and Solicitor

Rajendra PRASAD, appellant and

The Minister of Manpower and Immigration, respondent

Decision: November 14, 1968
(File: 68-5396)

Coram: A.B. Weselak, J.-P. Houle, G. Legaré

Prohibited class: taking employment without the written permission of an Immigration Officer. - S. 23 Report - Calling of witnesses by Special Inquiry Officer - Issuance of an unemployment insurance book and of a social security

card cannot be construed as a written approval to take employment - Order of deportation valid if one ground is valid. - Retroactivity - Jurisprudence. - Immigration Act: S. 5(t); 11(2)(3); 20; 21; 23; 28(3) - Immigration Regulations: S. 28; 29; 34(3)(d)(e)(f).-

Catégorie interdite: accepter un emploi sans la permission écrite d'un fonctionnaire à l'immigration - Rapport selon l'article 23 - Sommeation et interrogatoire de témoins par l'enquêteur spécial. - L'émission d'un livret d'assurance-chômage ou d'une carte de sécurité sociale n'équivaut pas à une permission écrite d'accepter un emploi. - Une ordonnance d'expulsion est valide en droit si l'un des motifs est valide - Retroactivité - Jurisprudence. - Loi de l'immigration: Art. 5(t); 11(2)(3); 20; 21; 23; 28(3) - Règlement de l'immigration: Art. 28, 29; 34(3)(d)(e)(f).-

Held:- For an applicant in Canada to take employment without the written approval of an officer of the Department cause the applicant to fall within a prohibited class pursuant to Section 5(t) of the Immigration Act and S. 5 is imperative, mandatory, and upon rendering his decision, the Special Inquiry Officer shall make an order of deportation against the applicant. On that ground alone such an order of deportation would be valid and in conformity with law and the appeal should be dismissed. -An order of deportation can only be attacked on the basis of the grounds which support it. The power of inquiry and the power to call and examine witnesses or any person are vested in the Special Inquiry Officer and such powers are discretionary. - An applicant is not entitled to a medical examination as of right. - Relying on the Leal case, S. 34(3)(e) of the Immigration Regulations applies retroactively. - The issuance of an unemployment insurance book and of a social security card are not tantamount to a written permission to take employment.

Arrêt. - Un requérant, au Canada, qui prend ou accepte un emploi sans avoir obtenu la permission écrite d'un fonctionnaire du Ministère, tombe dans une catégorie interdite en vertu de l'article 5(t) de la Loi sur l'immigration et cet article est impératif, obligatoire et au moment de rendre sa décision, l'enquêteur doit émettre une ordonnance d'expulsion contre le requérant. Pour ce seul motif, l'ordonnance d'expulsion serait valide en droit et l'appel devrait être rejeté. Seuls les motifs contenus dans l'ordonnance d'expulsion peuvent être attaqués. C'est l'enquêteur spécial qui est investi du pouvoir d'enquêter et d'interroger des témoins ou toute autre personne et ce pouvoir est discrétionnaire. Un requérant ne peut exiger, de droit, un examen médical. S'appuyant sur le jugement dans l'affaire Leal, l'article 34(3)(e) s'applique retroactivement.- L'émission d'un livret d'assurance-chômage ou d'une carte de sécurité sociale ne peut être tenu pour équivaloir à une permission écrite de prendre ou d'accepter un emploi.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.-P. Houle

The order of deportation reads:

- (i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a member of the prohibited class of persons described

in paragraph (t) of section 5 of the Immigration Act in that you do not fulfill or comply with the conditions and requirements of the Immigration Regulations, Part I by reason of the fact that:

- (a) you have taken employment in Canada without the written approval of an officer of the Department in contravention of paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part I,
- (b) you are not in possession of a valid and subsisting Immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part I,
- (c) your passport does not bear a medical certificate duly signed by a medical officer and you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I.

The appellant is a citizen of Fiji and has a valid British passport. He is married and his wife and two daughters reside at Ellington, Raki Raki, Fiji. The appellant entered Canada at Vancouver, B.C., January 21, 1967 as a visitor or tourist under Section 7(1)(c) of the Immigration Act until April 30, 1967 and his status was extended from April 21, 1967 to December 12, 1967. Prior to arrival in Canada, the appellant has had eight years of schooling and has worked as a stone mason, farmer and bus driver. The foregoing facts are not in dispute.

Counsel for the appellant has raised five issues in this particular case:

- 1.- can the examining Immigration Officer ask a person to leave Canada on the grounds of Section 34(3)(d)(e) and (f) and then make a Section 23 report on the grounds of Section 34(3)(e) and 28(1) and 29(1) so that the effect of such order is to exclude a Special Inquiry Officer from examining this case into the appellant's skill and qualifications;
- 2.- was the Special Inquiry Officer right in refusing to call the Immigration Officer who examined the appellant and was he right in refusing to call this officer as a witness;
- 3.- was the appellant entitled to a medical examination pursuant to Section 20 and 21 of the Immigration Act in connection with his examination by an Immigration Officer;
- 4.- if a person was employed prior to October 1st, 1967, is he caught within the prohibition of Section 34(e) although he is a person seeking admission under Section 7(3) of the Immigration Act because of his change in status by taking employment and in this particular case, in April of 1967;
- 5.- did the appellant receive the written approval of an officer of the Department to take work under Section 34(3)(e) if he was issued an unemployment insurance book and a social security card or in other words, was the issuance of such a card and book tantamount to giving the written approval required by Section 34(3)(e).

The main ground for the Order of Deportation is laid down in reason iii (a) of said Order: "You have taken employment in Canada without the written approval of an officer of the Department in Contravention of paragraph (e) of subsection (e) of section 34 of the Immigration Regulations, Part I". And, for an applicant in Canada to take employment without the written approval of an officer of the Department cause the applicant to fall within a prohibited class pursuant to Section 5(t) of the Immigration Act which reads: "5. No person shall be admitted to Canada if he is a member of any of the following classes of persons ... (t): "persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders lawfully made or given under this Act or the regulations". It should be stressed that Section 5 of the Immigration Act is imperative, mandatory; "No person shall be admitted" and sub-section (t) refers to "persons who cannot or do not fulfil or comply with any of the conditions or requirements...". Thus an applicant in Canada who does not comply with the condition or requirement as set out in paragraph (e) of subsection (3) of Section 34 of the Immigration Regulations, Part I, shall not be admitted to Canada and the Special Inquiry Officer, pursuant to Section 28(3) of the Immigration Act, "Shall, upon rendering his decision, make an order for the deportation of such person.". On that ground alone such an order for deportation would be valid and in conformity with Law and should be dismissed and therefore there is no need to examine the other grounds based on the lack of a valid and subsisting Immigrant visa as required by subsection (1) of Section 28 of the Immigration Regulation, Part I, and of a medical certificate duly signed by a medical officer or of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I (Ref: De Marigny v. Langlais (1948) S.C.R. 155 and Espillat-Rodrigues (1964) C.L.R. 3). In this instance grounds (i) and (ii) for the Order of Deportation are not in dispute. Therefore the Order of Deportation made against the appellant is valid and in conformity with Law. It should be stressed that this instant appeal is against that Order of Deportation as made by Special Inquiry Officer, A.K. Beattie, on May 18, 1968, and cannot be against anything else. In other words, the main issues before the Board are the grounds on which the Deportation Order was made and the Order can only be attacked on the basis of the grounds which support it. Thus any attempt to raise an issue out of the so-called check-out letter, filed as Exhibit X'1, is completely irrelevant and has no bearing on the Deportation Order.

To finally dispose of the first issue raised by Counsel for the Appellant, it is important to quote from the remarks made by the Chairman of the panel in this Appeal, as they appear at page 10 of the transcript:

"Chairman: With all due respect Mr. Drysdale, while this letter does contain three grounds at issue, I do not think it is necessary under the circumstances to include them in the Section 23 Report. Actually one ground for Deportation is sufficient and I really think you should restrict your arguments to the grounds in the Deportation Order."

and again at page 11:

"Chairman: There is nothing to stop you from bringing the background under Section 15. However, in legal argument we should restrict ourselves to the grounds in the Deportation Order."

Second issue raised by Counsel for the appellant is: Was the Special Inquiry Officer right in refusing to call the Immigration Officer who examined the appellant and was he right in refusing to call this officer as a witness?

The power of inquiry and the powers to examine witnesses or any person vested in the Special Inquiry Officer come under Section 11(2) & (3) of the Immigration Act.

Subsection 3 recites: "A Special Inquiry Officer has all the power and authority of a Commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of an inquiry, (a) issue a summons to any person requiring him to appear --- to testify to all matters within his knowledge relative to the subject matter of the inquiry".

A Special Inquiry Officer may issue a summons to any person to testify to all matters within his knowledge relative to the subject matter of the inquiry..... (The underlines are mine). It is clear that the status here is permissive, leaving to the best judgment of the Special Inquiry Officer whether or not he should call or summons a person to testify; it is a power vested in the Special Inquiry Officer and it is he who ought to decide whether or not such power should be exercised. There is no doubt that in some circumstances it could be very helpful to call the immigration officer who had conducted the inquiry to testify on matters relative to the subject matter of the inquiry, but again the decision is left with the Special Inquiry Officer. Thus one may ask whether a Special Inquiry Officer, in a given instance, has been unwise in not calling an immigration officer to testify, but certainly this is not a question on which the Board has to pass judgment. The case would be different if the "inaction" of the Special Inquiry Officer would result into gross injustice or into a denial of natural justice to an appellant and the Law provides remedies to cure such a situation. As for the third issue raised by Counsel for the appellant, one may say that Counsel has disposed of it in his own way. To quote at page 14 of the transcript of evidence;

"Mr. Drysdale: The other point which I raised, the third point, and might raise just in passing. It is not that important, whether Mr. Prasad was entitled to a medical examination under Sections 20 and 21 of the Immigration Act. There appears to be some authority that a person seeking admission to Canada shall undergo a physical or medical examination by a medical officer. This of course could be ordered at any time but again I had made the request at the inquiry in order to put the full situation before the Immigration Appeal Board. The difficulty I am faced with is that I just want to make one trip to Ottawa if I can avoid it. When an inquiry is instituted by a Special Inquiry Officer, if it covers the widest possible grounds, surely there cannot be any unfairness as far as the Board is concerned. All that I was seeking to do was to have the assessment put in by the examining immigration officer as to skills and qualifications, to have either the S.I.O. or immigration officer give him a medical examination. This would not prevent the Immigration Department from using Section 29(1) Because Mr. Prasad would still not be in possession of a medical certificate but the matter which I felt that was of some concern to the Board was to ascertain if he was physically fit....."

In any case medical requirements are dealt with under Section 29(1)(2) of the Immigration Regulations, Part I. The appellant does not meet the requirements under Section 29(1) and on this ground alone, the Deportation Order would be valid. As the question asked by Counsel was: "Was the appellant entitled to a medical examination ..." it is of interest to recite subsection (2) of Section 29: "(2) Where at an examination of an immigrant under the Act the immigration officer has any doubt as to the physical or mental condition of such person, he may refer the immigrant for further medical examination by a medical officer".

(Underlines are mine). The permissive phrase "he may" is the answer to the question as phrased by Counsel.

The question of applicability of Section 34(3)(e) of the Immigration Regulations, Part I, which constitutes the fourth issue raised by Counsel for the appellant, to a person who has taken employment prior to October 1st, has been resolved in the affirmative by the Board in the case involving Joao de Sousa Leal. It is of interest to note that application for leave to appeal in the Leal case, was refused by the Supreme Court of Canada.

As for the fifth issue raised by Counsel for the appellant, to say: "did the appellant receive the written approval of an officer of the Department to work under Section 34(3)(e) if he was issued an unemployment insurance book and a social security card or in other words, was the issuance of such a card and book tantamount to giving the written approval required by Section 34(3)(e)", the Board is prepared to make its own the argument submitted by Counsel for the respondent (at page 28 and 29 of transcript of evidence) and which essentially says 1) that social security cards and unemployment insurance book are not issued by the Department of Manpower and Immigration and 2) that no tribunal considering these matters would rationally conclude that the language, written approval of an officer of the Department, could be construed as including any officer whose duties did not involve considering these matters and, at the moment, only immigration officers are involved.

To sum up the case and to dispose of the legal arguments: the main reason for the Deportation Order against the appellant is that he has taken employment in contravention of Section 34(3)(e) of the Immigration Regulations, Part I and by doing so the appellant has placed himself within a prohibited class pursuant to Section 5(t) of the Immigration Act. The Board is satisfied that the appellant has taken employment without the written approval of an officer of the Department and on that ground alone the Board shall dismiss the appeal. Furthermore all other grounds as included in the Deportation Order dated May 16, 1968, are also valid. The Board therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

Finally the Board has considered the appellant's position in regard of Section 15 of the Immigration Appeal Board Act and cannot find sufficient grounds to exercise its discretion under this section.

The Board therefore directs that the Deportation Order be executed as soon as practicable.

Counsel:

For the appellant: John A.W. Drysdale, Barrister & Solicitor

For the respondent: R.E. Williams, Barrister and Solicitor

Randall Jay CAUDILL, applicant and

The Minister of Manpower and Immigration, respondent

Motion.-Requête

Decision: November 25, 1968
(File no: 68-5522)

Coram: J.C.A. Campbell, Vice-Chairman; J.P. Houle, J.A. Byrne

Jurisdiction of the Board as to the re-opening of a hearing. - Special circumstances warranting the re-opening. - Application for financial assistance.- Not received by the Board.- Respondent's written submissions served too late on the appellant. - Appellant deprived in a practical sense of a fair hearing. - Assessment by Immigration Officer. - Not manifestly wrong or proceeded upon a wrong principle. - Review of assessment by the Board. - One valid ground in a deportation order is sufficient to uphold such order. - Discretion of the Board under S. 15 of the Immigration Appeal Board Act: political activities and unusual hardship. - Immigration Regulations:S. 28(2); 29(1); 34(3)(e)(f) - Immigration Appeal Board Act: S.15. - Immigration Appeal Board Rules: S.16 - Jurisprudence.

Compétence de la Commission pour ordonner une réouverture d'instance.- Circonstances particulières justifiant une réouverture d'instance - Demande d'aide financière - non reçue par la Commission - Plaidoiries écrites de l'intimé fournies tardivement à l'appelant - L'appelant à toutes fins pratiques, n'a pu se faire entendre. - Appréciation non erronée ou appuyée sur un principe faux - Revision de l'appréciation par la Commission. -Un motif valide dans l'ordonnance d'expulsion suffit à rendre valide ladite ordonnance. - Pouvoirs discrétionnaires de la Commission en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration: activités d'un caractère politique ou graves tribulations. - Règlement de l'immigration: Art. 28(2); 29(1); 34(3)(e)(f).- Loi sur la Commission d'appel de l'immigration: Art. 15.- Règles de la Commission d'appel de l'immigration: Art. 16. - Jurisprudence.-

Held:- The Board has jurisdiction to re-open the hearing of an appeal and it will be for the applicant to show that in his case very special circumstances warrant such an order to re-open. (Ref. Tsantilli (Illiopoulos) appeal.). An application for financial assistance was made and should have been considered before the Appeal was heard. If the application had been refused counsel for the appellant might well have adopted some other method of presenting the appeal.- In the circumstances of this particular case the failure to forward the application for financial assistance in time for it to be considered and the result of such consideration notified to the appellant before the date set for the appeal hearing is such a special circumstance as warranting the Board ordering the appeal hearing to be re-opened.- Respondent's written pleadings were not served on appellant within a reasonable time.

The question whether the Board has the authority or jurisdiction to make a reassessment of an appellant was decided in the appeal of Gioulekas v the Minister of Manpower and Immigration: the Board will review the assessment and substitute its own opinion for that of the Immigration Officer only when the evidence will show that the Immigration Officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. If the appellant did not provide full, true and complete information leading up to his assessment he cannot now come before the Board to complain that he was assessed unfairly.

One valid ground in a deportation order is sufficient to uphold such order even if other grounds set out in the order are invalid.

To be liable to punishment for being an absentee without leave from the United States Marine Corps is certainly not the result of political activities nor can it be construed as being "unusual hardship". The fact that the appellant's opinion regarding the involvement of his country in the war in Viet Nam differs from those in authority in his country do not in the opinion of the Board constitute the existence of such compassionate or humanitarian grounds as to warrant the granting of special relief and the exercise by the Board of its discretion.

Arrêt:- La Commission a compétence pour ordonner une réouverture d'instance et il appartient au requérant de démontrer que dans son cas, il existe des circonstances particulières qui justifient une telle ordonnance.- (Ref. l'appel de Tsantilli (Illiopoulos)).- Une demande d'assistance financière avait été présentée et il aurait dû en être décidé avant l'audition de l'appel. Si ladite demande avait été rejetée, le procureur de l'appelant aurait très bien pu varier ses moyens au soutien de l'appel. Dans cette affaire particulière le défaut de procéder en temps utile sur la demande d'assistance et d'en porter l'adjudication à la connaissance de l'appelant avant l'audition de son appel constitue une telle circonstance particulière qui justifie une ordonnance de réouverture d'instance. Ce à quoi on peut ajouter que les plaidoiries écrites de l'intimé n'ont pas été signifiées à l'appelant en temps utile.

La question de savoir si la Commission a la compétence voulue pour réapprécier un appelant, a été tranchée dans l'affaire de Gioulekas et le Ministre de la Main-d'oeuvre et de l'immigration: la Commission ne revisera l'appréciation faite par un fonctionnaire à l'immigration et ne substituera sa propre opinion à la sienne, que s'il y a preuve que ce fonctionnaire en est venu à une conclusion manifestement erronée ou s'est appuyé sur un principe faux. Si l'appelant n'a pas fourni tous les renseignements, vrais et complets, il ne peut alors comparaître devant la Commission pour alléguer qu'il a été improprement apprécié.

L'existence dans une ordonnance d'expulsion d'un motif fondé en droit suffit à valider une telle ordonnance, même si les autres motifs ne sont pas fondés.

Un châtement éventuel pour avoir déserté le Marine Corps des Etats-Unis n'est certainement pas le résultat d'une activité de caractère politique et ne saurait être considéré comme de "graves tribulations". Le fait pour l'appelant de différer d'opinion avec les autorités de son pays sur la participation de celui-ci dans la guerre du Viet Nam ne saurait, de l'avis de la Commission, causer l'existence de motifs de compassion ou d'humanité suffisants pour apporter un redressement particulier et pour l'exercice, par la Commission, de ses pouvoirs discrétionnaires.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.C.A. Campbell, Vice-Chairman.

The order of deportation reads:

- " (i) you are not a Canadian citizen
- (ii) you are not a person having Canadian domicile,

- (iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of:
- (a) paragraph (e) of subsection 3 of section 34 of the Immigration Regulations in that you have taken employment in Canada without the written approval of an officer of the Department,
 - (b) paragraph (f) of subsection 3 of section 34 of the Immigration Regulations in that, in my opinion you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A except with respect to arranged employment,
 - (c) you are not in possession of a letter or pre-examination as required by subsection (2) of section 28 of the Immigration Regulations Part I of the Immigration Act,
 - (d) you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations Part I of the Immigration Act."

Consequent upon the issuing and serving of the deportation order upon Mr. Caudill on June 11, 1968 he filed a Notice of Appeal also dated June 11, 1968. In his Notice of Appeal he stated that he wished to be present or represented at the hearing of his appeal in order to make oral submissions to the Board, that he wished to call witnesses at the hearing of the appeal and that he wished to make submissions in writing.

Notice of hearing of this appeal dated July 5, 1968 was sent by the Board to the appellant and his counsel Mr. R.D. Gibson, Barrister-at-law. On July 26, 1968 a telegram from Mr. Gibson was received by the Board which read as follows:

"ON ADVICE WINNIPEG IMMIGRATION OFFICIALS REQUEST POSTPONEMENT
R.J. CAUDILL APPEAL DUE TO INABILITY TO FORWARD FINANCIAL
ASSISTANCE APPLICATION AND WRITTEN SUBMISSION
R.D. GIBSON APPELLANT'S COUNSEL"

As a result of Mr. Gibson's telegram an adjournment was granted until September 4, 1968 at 2:00 p.m. Appellant and his counsel were notified by telegram of the adjournment. A memorandum dated August 7, 1968 from Special Inquiry Officer L. Robertson was received by the Board on August 13, 1968, the relevant paragraphs read as follows:

"The appellant's counsel, Mr. Gibson, was contacted by telephone on July 29, 1968 and informed of the 6-week postponement.

Mr. Gibson stated that he is representing Mr. Caudill without fee on behalf of the Legal Aid Committee, as the subject has no funds. It is Mr. Gibson's intention

to submit a written submission to the Appeal Board but Mr. Caudill would like to also appear in person before the Board and it is on his behalf that financial assistance will be requested."

On August 19, 1968 the Board received a letter from Mr. Gibson dated August 15, 1968 enclosing written submissions in behalf of the appellant. Paragraph two of of his letter stated:

"It is not possible, for financial reasons, for me to appear before the Board on Mr. Caudill's behalf, but he wishes to appear himself, and has made an application for financial assistance in this regard. He will not be calling witnesses."

No request for financial assistance was received by the Board in respect of Mr. Caudill prior to the hearing of the appeal on September 4, 1968.

By letter dated September 12, 1968 and received by the Board on September 16, 1968, Mr. Gibson objected to the manner in which this appeal had been handled. He drew the Board's attention to the fact Mr. Caudill had applied for financial assistance, that the requisite forms had been filed with Mr. Robertson, the Special Inquiry Officer for forwarding to the Board and also that he (Mr. Gibson) had informed the local Immigration authorities in Winnipeg that Mr. Caudill himself wished to appear before the Board if financial assistance would be forthcoming. Mr. Gibson stated also that he was told that the decision whether or not to grant financial assistance would be communicated to his client. In fact, Mr. Caudill never did receive a reply from either the Board or the Department concerning his application for assistance and he was therefore unable to attend the hearing. In his same letter Mr. Gibson also pointed out that he did not receive a copy of the respondent's written submission until September 5, one day after the date set for the hearing of the appeal.

The Board granted financial assistance to Mr. Caudill in order that he might be present, together with his counsel, at the hearing of the Motion on October 31, 1968.

The appeal was heard by the Immigration Appeal Board on September 4, 1968. Neither the appellant nor his counsel was present at the appeal hearing although written submissions were received on his behalf. The respondent did not appear for the appeal hearing but relied upon written submissions which were forwarded to the Board. After considering the record before it, including the written submissions of both the appellant and respondent the Board dismissed the appeal and directed that pursuant to Section 15(1) of The Immigration Appeal Board Act the deportation order be executed as soon as practicable.

Counsel for the appellant filed a Notice of Motion dated September 19, 1968 with the Board. The Notice of Motion was in the following terms:

- "1. The hearing of the appellant's appeal before the Board be re-convened in order to allow oral representation to be made to the Board on behalf of the appellant who was unable to make such

representations at the original hearing of the appeal because:

- (a) his application for financial assistance to travel to Ottawa for the hearing was not transmitted to the Board although it was submitted to Special Inquiry Officer L. Robertson by the appellant, and
- (b) a copy of the respondent's written submission was not received by the appellant from the respondent until the day after the original hearing.

2. In the alternative, that the deportation order affecting the appellant be quashed, or the execution thereof stayed, pursuant to section 15 of the Immigration Appeal Board Act, on the ground that:

- (a) the appellant did not have a fair hearing of his appeal, being deprived of the opportunity to present his case fully before the Board, and
- (b) if the deportation order is executed the appellant is likely to be punished for activities of a political character, and to suffer unusual hardship in the United States."

Mr. Gibson told the Board that he was before it on two separate Motions. The first was a Motion to reopen the hearing of the previous sitting of the Board in order to complete the case. The second Motion, in the event the Board should hold it does not have jurisdiction to reopen the hearing, is an independent Motion under Section 15 of the Immigration Appeal Board Act to have the deportation order quashed or for a stay of execution. He asked that he be permitted to reserve his right to argue the second Motion in the event the Board should hold against him on the first one. The Board agreed to his request.

Mr. Gibson submitted that the Board had jurisdiction to reopen the hearing of an appeal which it had already decided. He referred the Board to its decision on a Motion to reopen the Tsantili (Iliopoulos) case. In that case the Board in its reasons for disposition of the Motion said, inter alia

"However the Board is continuing, its jurisdiction is continuing and before its order is executed nothing precludes or bars an appellant from filing with the Board a motion requesting an order to reopen and it will be for the applicant to show that in his case very special circumstances warrant such an order to reopen."

Appellant's counsel argued that special circumstances did exist in the instant case. The first special circumstance was that the appellant was deprived in a practical (not legal) sense of the opportunity to be present at the original appeal hearing and therefore was unable to meet the arguments made against him, and was also unable to elaborate on his own arguments. This coupled with the fact that the respondent's written submissions were not received by appellant's counsel until too late to respond in written form, meant that the respondent's

case was put fully to the Board whereas the appellant's case was put partially but not completely. The appellant wished to be present at the hearing of his appeal and if he had been present he would have presented two documents to the Board which were not available to him at the time of the Special Inquiry but were in his possession prior to the date set for the appeal hearing. These two documents were

- (a) the High School record of the appellant and
- (b) a classification and assignment test results relating to Mr. Caudill, dated July 1967.

It was Mr. Gibson's contention that if these two documents were before the Board when it heard the original appeal that they would have resulted in the Board coming to the conclusion the Special Inquiry Officer's personal assessment of the appellant was wrong.

Furthermore that in the written submission made to the Board in respect of Mr. Caudill the operation of Section 15 of the Immigration Appeal Board Act was not raised as the plan was to have the appellant come to the Board and explain fully why he should not be returned to the United States. By depriving him of this opportunity the appellant had been deprived of the right to have his case heard.

Counsel for the respondent agreed that there was no doubt that the appellant wished to be at the hearing of his appeal and that it was lack of funds which had prevented him from being present. However he argued that the appellant's non-appearance due to lack of funds was not a ground to reopen the hearing of the appeal. In counsel's submission the applicant on this motion had to go further and satisfy the Board that what he would have said at the appeal hearing would have had an important influence on the Board in making its decision on the Appeal. The two documents to which reference has already been made would not be likely to have had any real influence on the Board's decision when it heard the appeal initially. The evidence the appellant would have given as it appears from the material filed on the motion would not have had an important influence on the Board.

Mr. Thurm submitted further that the question whether or not Mr. Caudill has been properly assessed was not relevant on a motion to reopen. He pointed out that an assessment is relative only to Section 34(3)(f) of the Immigration Regulations, Part I whereas the deportation order was based on Sections 34(3)(e); 34(3)(f); Section 28(2) and Section 29(1) of the Immigration Regulations, Part I. Either Section 34(3)(e) or 34(3)(f) would disqualify Mr. Caudill from the visa waiver provisions in Section 34 of the said regulations.

Counsel for the respondent stated that if the Board has not considered Section 15 when it dealt with the appeal originally then there was no real alternative but for the Board to direct the reopening. He assumed however that the Board in dealing initially with the appeal would have followed its usual practice and considered the application of Section 15.

The Board has jurisdiction to reopen the hearing of an appeal - Tsantili (Iliopoulos) (1 I.A.C.). It remains therefore to consider whether there are special circumstances in the instant case which warrants a reopening being ordered.

From the relevant facts set out earlier in these reasons it is quite apparent that Mr. Caudill always intended to come to the hearing of his appeal, provided financial assistance was made available to him. He applied for such assistance through the proper channels but for some unexplained reason the application was not received by the Board prior to the appeal hearing on September 4, 1968. While of course it is not possible to state with certainty that financial assistance would have been granted in this case, the fact remains an application was made and should have been considered before the Appeal was heard. If the application had been refused counsel for the appellant might well have adopted some other method of presenting the appeal, for example, the appointment of an Ottawa agent. On the other hand and insofar as this Motion is concerned, the Board finds that in the circumstances of this particular case the failure to forward the application for financial assistance in time for it to be considered and the result of such consideration notified to the appellant before the date set for the appeal hearing is such a special circumstance as warrants it ordering the appeal hearing to be reopened. If Mr. Caudill had been present and testified at the hearing of his appeal it is not possible on the hearing of this Motion to say that his testimony may not have had some relevancy or bearing on the exercise of the Board's discretion under Section 15 of the Immigration Appeal Board Act.

The Motion is therefore allowed and the appeal hearing is hereby ordered to be reopened.

The legality of the deportation order was not seriously contested by counsel for the appellant. The appellant at his Inquiry admitted he had taken employment without the written approval of an Immigration Officer (Inquiry, page 9). He did not obtain the minimum number of units of assessment (fifty points) when assessed by an Immigration Officer on the basis of his application for permanent admission dated May 1, 1968. He admitted at the Inquiry that he was not in possession of a letter of pre-examination or a medical certificate as required by the Immigration Regulations (Inquiry, page 5).

The question whether the Board has the authority or jurisdiction to make a reassessment of an appellant was decided in the appeal of Gioulekas v the Minister of Manpower and Immigration 1 I.A.C. Mr. Gioulekas was assessed in accordance with Section 34 of the Immigration Regulations, Part I, and received a total of forty-five units. His counsel on appeal argued that the Board had the power to review the assessment and if necessary the power to revise it. The Board in its written reasons stated on this point "The appellant was not present at the hearing and his counsel did not in the opinion of the Board, considering the evidence before it, show that the Immigration Officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. It therefore in the instant case declines to review the assessment and substitute its own opinion for that of the Immigration Officer."

In the instant case there is no evidence to support a finding that the Immigration Officer acted upon a wrong principle or was manifestly wrong. He based his assessment on the information given him in the application for permanent residence filed by the appellant on May 1, 1968 and by personal interview. If the appellant did not provide full, true and complete information leading up to his assessment he cannot now come before the Board to complain that he was assessed unfairly.

The Board finds therefore that all grounds in the deportation order are valid. It therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

It should be pointed out that one valid ground in a deportation order is sufficient to uphold such order even if other grounds set out in the order are invalid: Espaillet-Rodriguez (1964) S.C.R. 3; De Marigny v. Langlais (1948) S.C.R. 155.

Having dismissed the appeal under Section 14 of the Immigration Appeal Board Act the Board now has to determine whether to exercise its discretion under the provisions of Section 15 of the said Act. The applicable portion of Section 15 reads as follows:

- "15.(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
- (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,
- the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

Mr. Caudill is a citizen of the United States of America. He is nineteen years of age and unmarried. His mother is a citizen of and resides in the United States. He attended school for twelve years, completing High School. On leaving school he enlisted in the United States Marine Corps and was absent without leave from that Corps when he came to Canada on April 17, 1968. He did not take any technical or vocational training after leaving school. He is not a landed immigrant. He has no relatives in Canada and has been here only a short time. He has no roots in this country. There is no evidence before the Board that reasonable grounds exist for believing that if returned to the United States he will be punished for activities of a political character. He may well be liable to punishment for being an absentee without leave from the United States Marine Corps. Such punishment is certainly not the result of political activities nor can it be construed as being "unusual hardship".

The fact that his opinions regarding the involvement of his country in the war in Viet Nam differ from those in authority in his home country do not in the opinion of the Board constitute the existence of such compassionate or humanitarian grounds as to warrant the granting of special relief.

The Board therefore declines to exercise its discretion under Section 15 and directs that the deportation order be executed as soon as practicable.

Counsel:

For the appellant: R.D. Gibson, Barrister & Solicitor

For the respondent: N.M. Thurm, Barrister & Solicitor

Mohammed RAFIK, Appellant and

The Minister of Manpower and Immigration, Respondent

Decision: December 4, 1968
(File no: 68-6002)

Coram: A.B. Weselak, J.-P. Houle, J.A. Byrne

Special Inquiry Officer. - Whether discretion to stay execution of deportation order - Notice of appeal - Board's jurisdiction to consider appeal under S. 14 and 15 of the Immigration Appeal Board Act. - Immigration Act: S. 19(1)(e)(vi)

Enquêteur spécial - A-t-il la discrétion de surseoir à l'exécution d'une ordonnance d'expulsion - Avis d'appel - La Commission a compétence pour connaître d'un appel en vertu des articles 14 et 15 de la Loi sur la Commission d'appel de l'immigration. Loi sur l'immigration: Art. 19(1)(e)(vi)

Held:- That no discretion exists in the SIO to stay the execution of an order of deportation, as the Immigration Act would clearly have spelled out such discretion if it had been Parliament's wish to confer it; - a single notice of appeal is sufficient for the Board to consider the appeal under both Section 14 (fact and law) and S. 15 (equity) of the Immigration Appeal Board Act, even though the appellant does not contest the legal validity of the deportation order.

Arrêt:- L'enquêteur spécial n'est pas investi de la discrétion de surseoir à l'exécution d'une ordonnance d'expulsion. Si le Parlement avait voulu lui conférer semblable compétence, il l'aurait clairement exprimé; la Commission peut connaître d'un appel conformément aux articles 14(fait et droit) et 15 (équité) de la Loi sur la Commission d'appel de l'immigration, sur un simple avis d'appel lors même que l'appelant ne s'attaque pas à la validité de l'ordonnance d'expulsion.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

A.B. Weselak

The order of deportation reads:

- "(i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under subparagraph (vi) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you entered Canada as a non-immigrant and remain therein after ceasing to be a non-immigrant or to be in the particular class in which you were admitted as a non-immigrant,
- (iv) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

The appellant is aged twenty-six, single, claims to be a Bio-Chemist and to have received a B. Sc. degree in New Zealand. These claims were not substantiated by any documentary proof. He further stated he had been employed for three years in a medical laboratory in New Zealand. In Canada he was employed by the Regina General Hospital, St. Joseph's Hospital in London Ontario, Children's Hospital in Winnipeg and the Department of Public Health in Regina.

The appellant arrived in Canada on December 11, 1966, and was allowed entry to Canada as a non-immigrant until June 15, 1967. He took employment on April 17, 1967, without permission from an Immigration officer.

Counsel for the appellant in his written submissions and oral presentations challenged the validity of the order on the grounds that:

1. At the Special Inquiry, he had requested a stay of the Deportation Order and that the Special Inquiry Officer had failed to consider exercising his discretion in this respect and cited the case of M.A.F. de Marigny v. J.M. Langlais, (1948) S.C.R. 155, in support of his argument.

The Board can find nothing in this case to support counsel's argument. It can also find nothing in the Immigration Act or Regulations thereunder which authorizes a Special Inquiry Officer to stay a Deportation Order. Had Parliament intended to give this authority to a Special Inquiry Officer, it would have expressly done so as it has done in Section 15 of the Immigration Appeal Board Act in giving the Board such authority.

2. If a person fully agreed with the law and fact of the finding of a Special Inquiry Officer, then they could not appeal to the Board on the basis of humanitarian or compassionate considerations.

The Board is of the opinion that when an appeal is filed, the appellant seeks relief under Section 15 of the Immigration Appeal Board Act in fact and law and also seeks relief under Section 14 in equity and the filing and service of the Notice of Appeal is sufficient for the Board to consider the appeal under both Sections.

The Board considering the evidence adduced at the Inquiry and received at the hearing finds that the Deportation Order was made in accordance with the Immigration Act and Regulations thereunder and therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

In considering this appeal under Section 15, the Board must consider whether the appellant falls within the provisions of Section 15(b) of the Immigration Appeal Board Act which reads:

"15(b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

- (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or,
- (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief."

There was no evidence adduced that the appellant would be punished for activities of a political nature. The appellant came as a visitor, used various aliases and moved about to avoid detection. The record shows that he deceived not only the Immigration authorities but other persons as well.

No evidence was adduced to the effect that his return to New Zealand would cause unusual hardship he was employed there and is still employable.

He claims to be engaged but no representations were received from his fiancée or her parents with whom he states he is residing.

As to compassionate and humanitarian grounds, he has no close relatives in Canada, no commitments nor has he established such roots here that uprooting would cause him anguish or hardship. Under this head the Board cannot find sufficient considerations that in its opinion warrant the granting of special relief.

The appeal under Section 15 of the Immigration Appeal Board Act is therefore dismissed and the Board directs that the Deportation Order be executed as soon as practicable.

Counsel:

For the appellant: D. Fenwick, Barrister and Solicitor

For the respondent: J. Pasman, Department of Manpower and Immigration

Giulio GRILLO, appellant et

Le Ministre de la Main-d'oeuvre et de l'immigration, intimé.

Décision: 9 décembre 1968
(Dossier no: 68-5638)

Coram: J.-Paul Geoffroy, Vice-Président; A.B. Weselak, U. Benedetti

Obligation faite à l'officier à l'immigration d'examiner toute personne qui cherche à entrer au Canada. - Demande ès-qualité de requérant indépendant ou ès-qualité de parent nommément désigné. - Erreur sur l'état du requérant. - Examen vicié. - Loi sur l'immigration: Art. 23; Règlement de l'immigration: Art: 33(1)(d); 34(3)(f).

An Immigration Officer shall examine every person who is seeking to come into Canada. - Application as an independent applicant or as a sponsored applicant - Improper assessment of an applicant - Examination null and void. - Immigration Act: S.23 - Immigration Regulations: S. 33(1)(d); 34(3)(f)-

Arrêt:- L'article 23 de la Loi sur l'immigration impose au fonctionnaire à l'immigration d'examiner toute personne qui cherche à entrer au Canada. Cet examen, pour être conforme à la Loi et au Règlement, consiste à apprécier les aptitudes de chaque requérant en regard des normes exigées. Ces dernières varient selon l'état du requérant: elles sont plus sévères lorsqu'il s'agit d'un requérant indépendant que lorsqu'il s'agit d'un parent nommément désigné. Une erreur sur l'état de la personne concernée, sur la qualité même du requérant, vicie totalement l'examen comme aussi est viciée et nulle l'enquête spéciale qui suit et qui ne corrige pas l'erreur initiale.-

Held:- Pursuant to S. 23 of the Immigration Act, the Immigration Officer shall examine every person who is seeking admission into Canada.- Such an examination shall be in accordance with the relevant provisions of the Act and of the Regulations. The Statute and the Regulations provide for an examination made in accordance with the established norms and these norms vary, according to the actual status of the applicant. If the Immigration Officer errs on the status of the applicant, if he does not conduct a proper examination, as prescribed by the Statute, then his examination is null and void and so is the Special Inquiry which does not rectify the misdirection made in examination.

The judgment of the Board was delivered by:
Le jugement de la Commission fut rendu par:

J.-P. Geoffroy, Vice-président:-

L'ordonnance d'expulsion se lit:

- "1) vous n'êtes pas un citoyen canadien;
- 2) vous n'êtes pas une personne ayant acquis le domicile canadien;

3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:

- a) selon l'avis d'un fonctionnaire à l'Immigration vous n'auriez pas été admis au Canada pour y résider en permanence si vous aviez subi un examen hors du Canada à titre d'immigrant indépendant et que votre admissibilité eût été établie conformément aux normes énoncées à l'Annexe "A", excluant le critère de l'emploi réservé tel que requis à l'alinéa (f) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration;
- b) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration;
- c) votre passeport ne contient pas de certificat médical dûment signé par un médecin du Ministère et que vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre tel que requis au paragraphe (1) de l'article 29 de la première partie des Règlements de la Loi sur l'Immigration."

Les faits dans cette affaire sont les suivants:

L'appelant, âgé de 57 ans, marié mais séparé, est un citoyen italien né en Tunisie. Il est électricien et a exercé ce métier jusqu'en 1961. Depuis cette date, il n'a pu travailler pour cause de maladie et est demeuré en Algérie avec sa fille et son gendre. Il est entré au Canada comme visiteur au mois d'août 1967, accompagnant sa fille et son gendre et leurs enfants qui, eux, furent admis comme immigrants. Avant l'expiration de son permis de séjour, il présenta une demande de résidence permanente. Il fut examiné comme requérant indépendant et refusé parce qu'il ne rencontrait pas les exigences du Règlement No.

L'appelant aurait soumis une demande le ou vers le 20 novembre 1967. Cette demande n'est pas au dossier. On trouve dans celui-ci une formule 1008 signée par l'appelant le 25 janvier 1968 référant à la catégorie 33(1) (d) et une formule O.S. 8 et 1010. Cette dernière est signée par son gendre et sa fille et porte la date du 26 de janvier 1968.

Le rapport prévu à l'article 23 mentionne que l'appelant a été examiné comme requérant indépendant en vertu de l'article 34, paragraphe 3, alinéa "f" du Règlement No.1 sur l'Immigration. De même, l'Ordonnance d'expulsion porte au Paragraphe 3, alinéa "a" que l'appelant ne peut être admis à titre d'immigrant indépendant parce qu'il ne rencontre pas les critères établis visant cette catégorie de personnes.

L'article 23 de la Loi sur l'immigration impose à l'Officier d'immigration d'examiner toute personne qui cherche à entrer au Canada. Cet examen, pour être conforme à la Loi et aux Règlements, consiste à apprécier les aptitudes de chaque

requérant en regard des normes exigées. Ces dernières varient selon le statut du requérant: elles sont plus sévères lorsqu'il s'agit d'un requérant indépendant que lorsqu'il s'agit d'un parent nommé désigné. Une erreur sur le statut de la personne concernée, sur la qualité même du requérant, vicie totalement l'examen comme aussi est viciée et nulle l'enquête spéciale qui suit et qui ne corrige pas l'erreur initiale.

Dans le cas présent, l'appelant était un parent nommé désigné dont l'admission était parrainée par son gendre et sa fille. Il a été considéré par l'Officier d'immigration et l'Enquêteur spécial et, de plus, désigné dans l'Ordonnance d'expulsion, comme un requérant indépendant. Pour ce, la Commission décide d'accepter l'appel.

Procureurs:

Pour l'appelant: Me E. Michael Berger, c.r.

Pour l'intimé: Me P. Landry, avocat

Michèle Auberte MAYOUTE, appellant and

The Minister of Manpower and Immigration, respondent

Decision: January 14, 1969.
(File no: 68-5959)

Coram:- J.V. Scott, Chairman, J.-Paul Geoffroy, G. Legaré.

Persons who may be allowed to enter and remain in Canada as non-immigrants.-
Visa or letter of pre-examination, medical certificate. - Not required. - Persons
exempted from the requirements of S. 28(3)(4), of Immigration Regulations
Part 1. - Immigration Act 7 (1)(h)

Les personnes qui peuvent entrer et demeurer au Canada à titre de non-immigrant -
Visa, lettre de pré-examen - certificat médical - Non exigés - Les personnes qui
ne sont pas soumises aux exigences de l'article 28(3)(4) du Règlement de
l'immigration, Partie 1.-

Loi sur l'immigration: Art. 7(1)(h).-

Held:- The appellant falls squarely within S. 7(1)(h) of the Immigration Act which deals with persons who may be allowed to enter and remain in Canada as non-immigrants, namely, "persons engaged in a legitimate profession, trade or occupation entering Canada or who having entered, are in Canada for the temporary exercise of their respective callings". Citizens of France are exempted by the Minister pursuant to the powers given to him by Section 28(4) of the Immigration Regulations, Part I, from the requirements of Section 28(3) - A non-immigrant does not require the medical certificate referred to in S. 29(1) of the Immigration Regulations, Part I.-

Arrêt:- L'article 7(1)(h) de la Loi sur l'immigration s'applique très exactement à l'appelante - Cet article traite des personnes qui peuvent entrer et demeurer au Canada à titre de non-immigrant, nommément "les personnes pratiquant une profession un commerce ou une occupation légitime qui entrent au Canada ou qui, étant entrées, sont dans ce pays pour l'exercice temporaire de leur état respectif" il peut être permis à ces personnes d'entrer et de demeurer au Canada, à titre de non-immigrants - En vertu des pouvoirs à lui conférés par l'article 28(4) du Règlement de l'immigration, Partie I, le Ministre a soustrait les résidents français aux prescriptions de l'article 28(3). - Un non-immigrant n'a pas besoin d'être porteur d'un certificat médical, tel que décrit au Règlement de l'immigration, Partie I.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J. V. Scott:-

The order of deportation reads:

- "1) vous n'êtes pas une citoyenne Canadienne;
- 2) vous n'êtes pas une personne qui a acquis le domicile Canadien;
- 3) vous êtes membre de la catégorie de personnes interdites décrites à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous n'observez pas ni ne remplissez quelques conditions ou prescriptions de la présente Loi ou des règlements n'étant pas en possession d'une lettre de pré-examen en la forme prescrite par le Ministre tel que requis au paragraphe (2) de l'article 28 des règlements sur l'Immigration, partie 1, et que son passeport ne contient pas de certificat médical dûment signé par un médecin du ministère et vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre, tel que requis au paragraphe (1) de l'article 29 des règlements sur l'Immigration partie 1."

The appellant was present at the hearing of her appeal, accompanied by her employer, Mme Lorraine Gagnon-Bélanger, who acted as her counsel and also testified on her behalf. The respondent, the Minister of Manpower and Immigration, was represented by Mr. Jacques Pépin.

The facts of this case are as follows: Mlle Michelle Auberte Mayoute, a citizen of France, born and brought up in Guadaloupe, aged 18, arrived in Canada to work as a domestic for her counsel, Mme Bélanger, pursuant to an arrangement made by that lady, with Mlle Irène Pelletier of the office of Canadian Manpower in Quebec City and a Mlle A. Adeline, principal of a school for the training of domestic workers in Guadaloupe, of which Miss Mayoute is a graduate.

It is unnecessary to set out in detail the somewhat complicated facts relating to this arrangement, though it should be stated that there is no doubt that Mme Bélanger acted in good faith throughout.

Mlle Mayoute arrived at Montreal Airport on October 19, 1968, in possession of a French passport bearing no visa for Canada. She travelled on a one way air ticket from Pointe à Pitre to Montreal. On her arrival, she was examined by an Immigration Officer and detained for an inquiry, which was held the next day- October 20, 1968, in the presence of her employer, Mme Bélanger, who acted as counsel.

During the course of the inquiry, appellant testified as follows, in reply to questions by Mr. Malouin, the Special Inquiry Officer: (page 6 of the Minutes of Inquiry)

"Q.- A cet examen hier, avez-vous demandé l'admission permanente ou temporaire?

R.- J'ai demandé de venir au Canada pour trois ans.

Q.- Pour quelle raison avez-vous demandé de demeurer au Canada pour trois ans?

R.- Pour travailler.

Q.- Aujourd'hui à cette enquête, demandez-vous l'admission permanente ou temporaire?

R.- Je ne sais pas, je suis venue ici de bonne foi pour travailler, peut-être que je demeurerai en permanence si je me plais ici.

Q.- Mademoiselle Mayoute, saviez-vous que pour travailler au Canada il fallait y venir comme immigrante?

R.- Non, monsieur.

Q.- Quel était votre but principal en venant ici?

R.- Pour gagner ma vie et voir comment ça se passe ici.

Q.- Diriez-vous que vous venez au Canada comme visiteur ou comme immigrante?

R.- J'avais l'impression de venir comme immigrante.

Q.- Mademoiselle Mayoute, je dois donc comprendre à la suite de votre déclaration que vous venez ici en permanence, En conséquence, je dois vous examiner au point de vue Immigration comme immigrante. Comprenez-vous bien cela?

R.- Oui, monsieur."

It may be noted that all Mlle Mayoute's answers, except the last two, are consistent with an intention to enter Canada as a non-immigrant. She stated categorically that she had asked to come to Canada for three years, and there was at no time any evidence before the Special Inquiry Officer that she intended to be, or was in fact an applicant for landed immigrant status in Canada. It is true that in reply to the question "Diriez-vous que vous venez au Canada comme visiteur ou comme immigrante?" she said "J'avais l'impression de venir comme immigrante.", but

this answer is entirely comprehensible in view of Mr. Malouin's prior question "Mademoiselle Mayoute, savez-vous que pour travailler au Canada il fallait y venir comme immigrante?" In asking this question, Mr. Malouin, no doubt innocently, misled the appellant, and, as may be deduced from his decision, himself.

Section 7(1)(h) of the Immigration Act reads as follows:

Section 7(1) "The following persons may be allowed to enter and remain in Canada as non immigrants, namely,

(h) persons engaged in a legitimate profession, trade or occupation entering Canada or who, having entered, are in Canada for the temporary exercise of their respective calling;"

On the evidence adduced at the inquiry, the case of Mlle Mayoute falls squarely within this section, and the Special Inquiry Officer should have entered her as a non-immigrant for the period requested, namely three years.

As a non-immigrant, Mlle Mayoute, a French citizen, does not require a visa or letter of pre-examination. Section 28(3) of the Immigration Regulations, Part 1, reads as follows:

"28.(3) Every non-immigrant who seeks to enter Canada shall be in possession of a valid and subsisting non-immigrant visa issued to him by a visa officer and bearing a serial number which has been recorded by such officer in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted entry to Canada."

The Minister has, however, pursuant to the powers given to him by Section 28(4) of the Immigration Regulations, Part 1, exempted "citizens of France" and "persons born in any country of North, South or Central America or stands adjacent thereto coming to Canada directly from such country or island" from the requirements of Section 28(3).

Further, a non-immigrant does not require a medical certificate, pursuant to Section 29(1) of the Immigration Regulations, Part 1, since that section applies only to immigrants.

The order of deportation made against Mlle Mayoute on October 20, 1968, is therefore null and void.

Pursuant to Section 14 of the Immigration Appeal Board Act, the Board may "dispose of an appeal under Section 11...by...(c) rendering the decision and making the order that the Special Inquiry Officer who presided at the hearing should have rendered and made." The Board, therefore, has rendered the decision that Mlle Mayoute be admitted to Canada for a period of three years from January 15, 1969, with the status of non-immigrant under Section 7(1)(h) of the Immigration Act.

Counsel:

For the Appellant: Mme Lorraine Gagnon-Bélanger

For the Respondent: Mr. Jacques Pépin, Ministre de la Main-d'oeuvre et de l'Immigration

John MOSHOS and Family, appellants and

The Minister of Manpower and Immigration, respondent

Decision: March 11, 1969
(File no: 69-14)

Coram: J.C.A. Campbell, Vice-Chairman, U. Benedetti, J.A. Byrne

Presence of the person concerned, whenever practicable, at the inquiry by a Special Inquiry Officer. - Proof of Dependency - Change of status by making application for permanent residence. - Immigration Act: S.27(1); 37(1).-

Présence du sujet à l'enquête de l'enquêteur spécial, lorsque pratiquement possible - Preuve de la dépendance. - Changement d'état par suite d'une demande de résidence permanente.

Held:- There is nothing in the Immigration Act which says a witness must be present throughout the entirety of Inquiry. However if a person who is called as a witness is likely to become subject to deportation as a dependant then all the applicable rules and regulations relating to the holding of an Inquiry must be observed in order to protect the fundamental rights of such a person. - The Board finds that the Special Inquiry Officer complied with the requirements of the Immigration Act and its regulations in that Mrs. Moshos was informed of the probable results of the Inquiry in so far as she and the children were concerned, that she was not denied counsel and that she received a fair hearing. - At the time of the Inquiry she was not employed and she has not been given permission to work. It follows that at the time of the Inquiry she was a dependant and she admitted this fact. Her expressed intention to work at some time in the future, if permitted to remain in Canada, does not take her out of the category of "dependant". Provision in the Immigration Act for the inclusion of dependants in a deportation order made against the head of the family is quite separate and distinct from any application made by a non-immigrant for permanent residence. If argument to the contrary were to prevail it would mean that any non-immigrant by making a speedy application for permanent residence could nullify the related provisions of the Act. This cannot be the intent of the Act.-

Arrêt:- Il n'y a rien dans la Loi de l'immigration qui dit qu'un témoin doit être présent durant toute la durée d'une enquête. Cependant si une personne citée comme témoin peut devenir sujette à expulsion - comme dépendant - alors on doit appliquer toutes les règles pertinentes à la tenue d'une enquête afin de protéger les droits fondamentaux de cette personne. La Commission estime que l'enquêteur s'est conformé aux prescriptions et au règlement de la Loi de l'immigration: Mme Moshos fut informée des conclusions probables de l'enquête, quant à elle et à ses enfants; on ne lui a pas nié le droit à un procureur et elle a reçu audience équitable. Au moment de l'enquête elle n'avait pas d'emploi et elle n'avait pas obtenu l'autorisation de travailler. Il s'en suit qu'au moment de l'enquête elle était "un dépendant" et elle a admis le fait. Son intention avouée de travailler, plus tard, si elle était autorisée à demeurer au Canada, ne l'exclut pas de la classe des "dépendants". Il faut maintenir une distinction claire et précise entre une demande de résidence permanente soumise par un non-immigrant, et les prescriptions de la Loi de l'immigration qui pourvoient à l'inclusion

des dépendants dans une ordonnance d'expulsion rendue contre le chef de famille. - En tenir pour l'opinion contraire signifierait qu'un non-immigrant pourrait par une demande hâtive de résidence permanente, rendre de nul effet les prescriptions pertinentes de la Loi. L'intention de la Loi ne peut être telle.-

Note:

Appeal dismissed by the Board. - Appeal by Mrs. Moshos to the Supreme of Canada, allowed.-

Appel rejeté par la Commission - Appel de Mme Moshos à la Cour Suprême du Canada, accueilli.-

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.C.A. Campbell

These are the appeals of John Moshos, his wife, Smaroula Moshos and their two minor children, Sultana and Panagiotis Moshos who were ordered deported on 6 December 1968, by Special Inquiry Officer C.L. Somers at Toronto, Ontario, in the following terms:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile, and that:
- (3) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act as you cannot or do not fulfil or comply with the conditions or requirements of the Immigration Act or the Regulations in that:
 - (a) you are not in possession of a letter of pre-examination in the form prescribed by the Minister in accordance with the requirements of subsection (2) of section 28 of the Immigration Regulations, Part 1, and you are not eligible for admission to Canada for permanent residence without said letter of pre-examination since you have taken employment in Canada without the written approval of an officer of the Department contrary to the conditions of paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part 1; amended;
 - (b) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part 1.

This order includes your dependent wife and children, Smaro (Smaroula), Sultana and Panagiotis Moshos under the provisions of subsection (1) of section 37 of the Immigration Act."

Mr. and Mrs. Moshos were both present at the hearing of their appeals. Mr. Moshos was represented by C. Amourgis, Barrister. Mr. N.A. Endicott, Barrister, represented Mrs. Moshos and the two minor children.

At the commencement of the hearing before the Board it was agreed that the appeal of Mrs. Moshos (including the two children) would be heard prior to that of Mr. Moshos.

There was no dispute that all the appellants are not Canadian citizens or that they have not acquired Canadian domicile within the meaning of the Immigration Act. Furthermore it was not disputed that the two minor children are dependants.

The relevant facts relating to all the appellants are as follows:

Mr. Moshos was born in Greece on 1 December 1936. He is now a naturalized citizen of Australia. He has three sisters none of whom reside in Canada. He commenced school at the age of seven, leaving at age fifteen. After leaving school he learned the trade of blacksmith from his father for a period of three years. At age eighteen he migrated to Australia and became a naturalized citizen of that country. He had various employment in that country, his last two jobs (according to the information given on his application for permanent residence in Canada) being with National Forges Company as a press operator from 1951 to 1959 and with General Paper Mills from 1959 to 1967 as a transport driver and paper maker. In Australia, in 1959, he married his present wife. They have two children both born in Australia. Early in 1966 he returned to Greece. His wife and two children had proceeded him to Greece as her mother was not well. While in Greece on 5 July 1967 he completed an application for permanent admission to Canada. He claims he did not receive the letter of refusal (Exhibit A-4, Appeal hearing) nor did he know this application had been refused.

Mr. Moshos entered Canada on 22 November 1967 as a non-immigrant (7 (1)(c)) for a period to expire 21 April 1968. On 2 January 1968 he applied for permanent admission to Canada. His application form shows that his wife and two children are to follow him to this country. His passport was endorsed on 2 January 1968 "not permitted to take employment in Canada".

Mrs. Moshos, who was born in Greece, is also a naturalized Australian citizen. Her trade is that of a carpet weaver. She worked at this trade for five or six years in Australia as a weaver and mender engaged in finishing carpets except for the times she was unable to work because of her pregnancies. At the Inquiry she stated her salary, in Australia, was \$70.00 a week. It is her intention to obtain work in Canada, if she should be permitted to remain.

Mrs. Moshos, accompanied by her two minor children Sultana and Panagiotis, entered Canada on 9 March 1968 as non-immigrants pursuant to Section 7(1)(c) of the Immigration Act (visitors or tourists) for a period to expire on 9 April 1968. On 19 March 1968 she applied for permanent residence in Canada and was given an appointment for 19 April 1968 on which date she would be interviewed by the Immigration authorities regarding her application. On 19 April 1968 her passport was endorsed NIAL (non-immigrant applicant for landing).

Mr. Endicott, counsel for Mrs. Moshos and the two minor children, challenged the validity of the deportation order on the following grounds:

- (a) That Mrs. Moshos had not been present throughout the whole inquiry which was contrary to Section 27(1) of the Immigration Act and therefore she did not have a proper hearing. In support of this portion of his argument Mr. Endicott referred the Board to its decision in the appel of Ioranides, Immigration Appeal Board file 67-5055, which he stated to be similar to the instant case insofar as it applied to Mrs. Moshos. Section 27(1) is as follows:

"27(1) An inquiry by a Special Inquiry Officer shall be separate and apart from the public but in the presence of the person concerned wherever practicable."

- (b) That Section 37(1) of the Immigration Act is probably void as being contrary to the Canadian Bill of Rights.
- (c) That the evidence does not support a finding by the Special Inquiry Officer that Mrs. Moshos is a dependant.
- (d) That as Mrs. Moshos was an applicant for landing her status had changed from that of a visitor and as such her application should be dealt with in the normal way.

Dealing seriatim with Mr. Endicott's arguments:

- (a) The Special Inquiry Officer called Mrs. Moshos as a witness at her husband's inquiry. There is nothing in the Immigration Act which says a witness must be present throughout the entirety of an Inquiry. Section 27(1) refers to the "person concerned" being present and even this is qualified in that section by the use of the words "wherever practicable". Section 37(1) does not mention either an Inquiry or a Special Inquiry Officer. However if a person who is called as a witness is likely to become subject to deportation as a dependant then all the applicable rules and regulations relating to the holding of an Inquiry must be observed in order to protect the fundamental rights of such a person. Were these rules and regulations observed in this case? Mrs. Moshos having been called as a witness and after being sworn was advised by the Special Inquiry Officer as follows: (Inquiry, page 18)

"Q. Are you the wife of John Moshos concerning whom this Inquiry is being held?

A. Yes.

Q. Mrs. Moshos, subsection (1) of section 37 of the Immigration Act reads as follows:

"Where a deportation order is made against the head of the family, all dependent members of the family may be included in such order and deported under it."

By Counsel:

At this particular point I would like to make a submission to you sir that it not be interpreted by you or anyone else that I am appearing on behalf of this witness and I have come here only for the purpose of defending the rights of Mr. John Moshos so as an amicus curiae I would like to make the following submission that this particular lady might want to retain a lawyer to protect her rights in the event some of the facts used in this inquiry be used at a much later date against her. On her behalf I take the liberty of asking the protection of the Canada Evidence Act for all answers she might give in this inquiry that will tend to incriminate her or be used against her at any later proceedings. If this witness is brought on behalf on the Immigration Department, I, as counsel, to John Moshos reserve my right to cross-examine her on the evidence she might give pertaining to my client's inquiry. Thank you.

By Special Inquiry Officer to Witness:

In view of this section of the Regulations, in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and the children in such deportation order.

Q. Do you understand that?

A. Yes, of course.

Q. As your husband's counsel has pointed out, he is not prepared to act for you and you do have the rights to be represented by counsel yourself. Do you wish to secure counsel?

A. Yes, Mr. Amourgis.

Q. Mr. Amourgis is not prepared to accept you as a client at this time?

A. Why, I have to get a lawyer.

Q. Do you wish to secure other counsel before giving evidence?

A. No, I do not want a lawyer.

Q. In the event Mr. Amourgis is not prepared to act as counsel, do you wish to proceed with the giving of evidence without counsel?

A. Yes."

In the Board's opinion the reading to Mrs. Moshos of Section 37(1) by the Special Inquiry Officer together with the explanation he gave her was sufficient notice of the purpose of her being called to give evidence and what might happen as a result of her giving evidence. She was given the opportunity to request counsel and

elected to proceed without counsel being present. There is the further fact that Mr. Amourgis spoke to the Special Inquiry Officer, in her presence, and suggested that she might wish to have a lawyer represent her but despite this intervention she saw fit to proceed without counsel.

The case of Ioannis Ioranides, Immigration Appeal Board 67-5055, (not reported) is of no assistance in the instant appeal. Mrs. Ioranides a "landed immigrant" was included under the provisions of Section 37(1) of the Immigration Act in a deportation order made against her husband. Mr. J. Paul Geoffroy who wrote the judgment of the Board in that case said *inter alia*:

" Il en va différemment dans le cas de son épouse. Celle-ci a été appelée comme témoin au cours de l'enquête concernant son mari. L'Officier spécial d'enquête lui a posé plusieurs questions relatives à son identité, son statut au Canada et son mariage. Il lui demanda également si elle avait déjà travaillé au Canada et si elle avait des épargnes. Il s'assura aussi qu'elle était au courant de la raison pour laquelle son mari était cité à l'enquête.

Il est à noter que l'Enquêteur spécial n'a pas informé Madame Ioranides de son droit de retenir les services d'un avocat ou autre conseiller. Il n'a pas, non plus, informé Madame Ioranides du but de l'audition et qu'elle pourrait, par la suite, être expulsée du Canada.

L'Article 37(1) de la Loi sur l'immigration permet d'inclure dans une Ordonnance d'expulsion rendue contre le chef d'une famille tous les membres à charge du chef de famille. Il faut établir que ces membres sont à la charge du chef de famille. Le dépendance, n'étant pas autrement qualifiée, doit en être une qui revêt une certaine permanence. Elle ne peut pas n'être qu'accidentelle. L'Article 37(1) ne parle pas d'enquête, ni d'officier spécial d'Immigration. On doit comprendre, à la lecture de l'ensemble de la Loi sur l'immigration que cette inclusion relève de la juridiction de l'Enquêteur spécial et, semble-t-il, il ne peut l'exercer qu'à la suite d'une enquête qu'il doit tenir dans les cas prévus par la Loi sur l'immigration. L'émission d'une Ordonnance d'expulsion est donc nécessairement précédée d'une enquête par un Enquêteur spécial. A notre avis, l'inclusion d'une personne à charge dans l'Ordonnance d'expulsion émise contre le chef de famille équivaut à toutes fins à l'émission d'une Ordonnance d'expulsion. Elle doit être précédée d'une enquête et les règles prévues dans les Règlements sur les enquêtes de l'immigration doivent être scrupuleusement observées, en particulier celles qui tendent à protéger les droits fondamentaux d'une personne.

Dans le cas de Madame Ioranides l'Enquêteur spécial, bien que les règlements lui en fassent obligation, ne l'a pas informée de son droit de retenir les services d'un avocat ou d'un conseiller, (Article 3 des Règlements de la Loi sur l'immigration). Ce qui est encore plus grave, l'Enquêteur spécial, bien que tenu de le faire, (Article 8 du Règlement de la Loi sur l'Immigration), n'a pas informé Madame Ioranides que le but qu'il poursuivait au cours de l'audition était de déterminer si elle était une personne qui pouvait demeurer au Canada. Le procès-verbal de l'enquête nous révèle qu'elle fut entendue comme témoin dans une affaire qui, à première vue, ne concernait que son mari soupçonné d'être entré et d'être demeuré au Canada illégalement. La Commission considère que Madame Ioranides n'ayant pas été informée de l'objet de l'enquête, ni non plus de son droit à être assistée d'un conseiller, a été privée des moyens que la Loi et la justice naturelle considèrent essentiels à la tenue d'une enquête dont l'issue est une décision de nature quasi judiciaire.

L'Enquêteur spécial devait, pour justifier l'inclusion de Madame Ioranides dans l'Ordonnance d'expulsion de son mari, établir qu'elle était à la charge de ce dernier. L'Article 37(1) ne réfère pas aux obligations qu'impose le droit commun au mari ou à la femme. Les termes utilisés, "à charge de" (texte anglais "dependent"), ont une connotation exclusivement économique. "A charge de" veut dire que la personne visée ne peut par elle-même subvenir à ses besoins et, qu'en l'absence du chef de famille, elle deviendrait à charge du public, ce qui en vertu de l'Article 19(1)(e)(5) de la Loi sur l'immigration, la classerait dans une des catégories interdites, soit celle visée par l'Article 5(h). Cette dépendance doit s'étendre sur une certaine durée. Un immigrant qui, à la suite d'un accident de travail, souffrirait d'une incapacité temporaire, ne serait pas de ce fait sujet à être expulsé. Il en va de même dans les cas de maladie, de chômage, etc. Dans le cas d'une femme, la dépendance pour être valable doit supposer l'incapacité à occuper une fonction rémunératrice. La grossesse est de nature temporaire et lorsqu'une femme a, avant de devenir enceinte, exercé un métier ou rempli une occupation lui permettant de subvenir à ses besoins, elle peut être présumée habile à réintégrer son emploi une fois la délivrance accomplie et à pouvoir subvenir à ses besoins. Madame Ioranides, avant sa grossesse, avait occupé un emploi rémunérateur. Rien dans la preuve ne nous indique qu'elle ne pourra pas y retourner. La Commission considère qu'aux termes de l'Article 37(1), elle ne peut être considéré une personne à charge.

La Commission décide donc d'accepter l'appel de Madame Ioranides."

In the instant appeal the Special Inquiry Officer having read Section 37(1) of the Immigration Act informed Mrs. Moshos that she and the children might be included in the event a deportation order should be issued against her husband and he informed her of her right to counsel.

The Board finds that the Special Inquiry Officer complied with the requirements of the Immigration Act and its regulations in that she was informed of the probable results of the Inquiry insofar as she and the children were concerned, that she was not denied counsel and that she received a fair hearing.

- (b) Mr. Endicott did not refer the Board to any Section or Sections of the Canadian Bill (1960) R.S.C. Chapter 44, in support of his generalization that Section 37(1) was probably void as being contrary to the Bill of Rights. As there was no argument or submission made in support of this generalization the Board considers it unnecessary to deal with this point.
- (c) The evidence at the Inquiry showed that Mrs. Moshos had been gainfully employed in Australia as a carpet weaver. While she testified at the Inquiry that she intended to work either at her trade or at some other employment if she should be permitted to remain in Canada the fact remains she was not employed at the time of the Inquiry and that she had not been given permission to work (Inquiry, page 20). It follows that at the time of the Inquiry she was a dependant and she admitted this fact (Inquiry, page 20). Her expressed intention to work at some time in the future, if permitted to remain in Canada, does not take her out of the category of "dependant".
- (d) Mrs. Moshos applied for permanent residence on 19 March 1968, ten days after her arrival in Canada. Parliament in Section 37 of the Immigration Act has seen fit to provide for the inclusion of dependants in a deportation order made against the head of a family. Such provision (i.e.) Section 37 is quite separate and distinct from any application made by a non-immigrant for permanent residence. If Mr. Endicott's argument were to prevail it would mean that any non-immigrant by making a speedy application for permanent residence could nullify the provisions of Section 37(1). This cannot be the intent of the Act. In the opinion of the Board the Special Inquiry Officer did not lose jurisdiction under Section 37(1). In the circumstances of this case the fact Mrs. Moshoe had made application for permanent residence is irrelevant.

The Board finds that there are legal and valid grounds to support the inclusion of Mrs. Moshos and the children under the provisions of Section 37 (1) of the Immigration Act in the deportation order made against her husband, John Moshos. In accordance with Section 14 of the Immigration Appeal Board Act it dismisses her appeal and that of the two children.

Counsel for the appellant, John Moshos, did not contest the legality and validity of the deportation order made against him. He based his appeal on Section 15 of the Immigration Appeal Board Act and asked the Board to exercise its discretion and direct a stay of execution of the said order on humanitarian grounds.

Despite the fact counsel for Mr. Moshos did not contest the legality of the deportation order made against him the Board nevertheless reviewed the evidence before it to ascertain if the grounds set out in the order were supported by the evidence.

At page 10 of the Inquiry Mr. Moshos admitted he had not received written permission from an officer of the Department to take employment in Canada. He admitted also that he had taken employment (Inquiry, pages 9 and 10; Exhibit

"C"). At page 8 of the Inquiry he admitted he was not in possession of a letter of pre-examination and at page 12 of the Inquiry he admitted he was not in possession of the requisite medical certificate.

The Board finds ample evidence to support all the grounds set out in the deportation order made against the appellant John Moshos. It therefore dismisses his appeal under Section 14 of the Immigration Appeal Board Act.

Having dismissed the appeals on legal grounds the Board gave consideration to the exercise of its discretion under Section 15 of the Immigration Appeal Board Act. As all the appellants are non-immigrants the applicable portion of that Section is as follows:

- "15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
- (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,
 the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

Mr. Moshos came to Canada as a visitor on 22 November 1967 for a period to expire on 21 April 1967. He applied for permanent residence on 2 January 1968. His wife and two children also came to Canada as visitors entering this country on 9 March 1968 for a period to expire on 9 April 1968. His wife applied for permanent residence on 19 March 1968. While in Greece on 5 July 1967 he had completed an application for permanent residence in Canada but claimed he did not know the application had been refused. He has taken unauthorized employment in this country and at the time of the Inquiry was earning a salary of approximately \$100.00 per week. His assets in Canada consist of furniture which he values at \$500.00 and on which he owes approximately \$200.00 as well as \$50.00 in the Bank of Nova Scotia. He also had a loan of approximately \$500.00 from the Bank. He has no assets outside Canada. With the exception of his wife and children Mr. Moshos has no close relatives in Canada. He has no real roots in this country nor is his employment of vital importance to his employer or Canada.

Mrs. Moshos at the Inquiry stated (page 22)

"Q. If your husband was not allowed to remain in Canada would you want to stay here without him or go with him?

A. I will go with my husband wherever he goes."

whereas at the Appeal hearing she said (page 19)

"Q. You would like to stay in Canada without your husband?

A. Yes.

Q. If he is deported and you were allowed to stay, you would stay?

A. Yes, I have two kids, you know, and my kids go to school. I like to stay and my kids like it here. Its best country for my kids, it come big, you know, go to school, its best country."

There is no evidence that any of the appellants will be punished for activities of a political character if they should be deported. It cannot be said they will suffer unusual hardship if they are returned to Australia, as they were both gainfully employed there. The fact this family - which must be treated as a unit - wishes to remain in Canada for economic reasons and to bring up their family is not in the Board's opinion a sufficient compassionate or humanitarian ground which warrants special relief being granted in this case.

The Board therefore declines to exercise its discretion under Section 15 of the Immigration Appeal Board Act and directs that the deportation order be executed as soon as practicable.

Counsel:

For the appellant: C. Amourgis and N.A. Endicott, Barristers

For the respondent: J.T. Pasman, Department of Manpower and Immigration

Jorge Alfredo BELT-Y-DE CARDENAS, appellant and

The Minister of Manpower and Immigration, respondent

Decision: March 17, 1969
(File no: 68-6174)

Coram: J.V. Scott, Chairman, G. Legaré, U. Benedetti

A person who seeks to come into Canada from the United States. - To be legally, as opposed to geographically, out of the country - S. 23 Report. - Immigration Act-

Further examination - Inquiry. - Immigration Act: S. 24(1)(2) - Immigration Regulations: S. 27(1); 28(1); 29(1). - Jurisprudence.-

Une personne qui cherche à entrer au Canada, venant des Etats-Unis.- Se trouver hors du pays, selon la loi ou physiquement. - **Rapport** en vertu de l'aticle 23, Loi sur l'immigration. Enquête et enquête complémentaire - Loi sur l'immigration: Art. 24(1)(2); Règlement de l'immigration: Art. 27(1); 28(1); 29(1); Jurisprudence.-

Held: The Board having considered and evaluated all its previous decisions, the appellant was not a person who "seeks to come into Canada from the United States." Such a person must be legally (as opposed to geographically) out of the country. The appellant therefore should have been the subject of a full inquiry, pursuant to S. 24(2) of the Immigration Act, rather than a further examination pursuant to S. 24(1), and failure to hold such an inquiry was a defect in substance as well as in procedure. Appeal allowed.-

Arrêt: A la lumière de jugements antérieurs rendus par la Commission, l'appelant n'était pas une personne qui cherchait à entrer au Canada, venant des Etats-Unis et il aurait dû, par conséquent, faire l'objet d'une enquête conformément à l'article 24(2) de la Loi sur l'immigration, plus que d'un examen complémentaire en vertu de l'article 24(1).- Le défaut de tenir une telle enquête entâche de nullité la procédure aussi bien que le fond et l'appel doit être accueilli à toutes fins que de droit.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.V. Scott:-

The order of deportation reads:

- "(1) you are not a Canadian citizen,
- (2) you are not a person having Canadian domicile, and that
- (3) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of the fact that you are not in possession of an unexpired passport issued to you by the country of which you are a subject or citizen as required by subsection (1) of Section 27 of the Immigration Regulations, Part 1, amended of the Immigration Act and you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part 1, amended of the Immigration Act and your passport does not bear a medical certificate duly signed by a medical officer, nor are you in possession of a medical certificate in the form prescribed by the Minister, as required by subsection (1) of section 29 of the Immigration Regulations, Part 1, amended of the Immigration Act."

The facts of this case are as follows: The appellant is a thirty-four year old citizen of Cuba, unmarried, a graduate of Lasalle College in Havana. After 1953 he attended various universities in the United States, but returned to Cuba from time to time, until 1958, when he left that country for the last time. He then travelled in Europe until 1960, when he settled in England and obtained employment as a market research analyst there. On May 27, 1967, he arrived in Canada, with the intention of visiting Expo, and was admitted to this country as a non-immigrant for a period of five weeks. At that time he was in possession of a Cuban passport issued at Havana February 14, 1966, but obtained by Him at the Cuban Embassy in London, England. This passport was valid until 1971. It was subsequently stolen from him sometime during his stay in Canada.

On June 5, 1967, the appellant applied for permanent admission to Canada at the Montreal Office of the Canada Immigration Division, Department of Manpower and Immigration. He withdrew this application on August 8, 1967, requesting instead a temporary stay in this country for a period of one year, with permission to work. This was refused, and a letter was given to the appellant requesting him to leave Canada before August 21, 1967. The appellant, however, remained in Montreal and changed his name to avoid detection by Canada Immigration Officials - a fact which he freely admitted.

The appellant did not work in Canada until after his first appearance before the Board on January 7, 1969. He was supported by his mother who is a legal resident of the United States, having entered that country as a Cuban refugee in 1962.

Around December 1967 the appellant voluntarily entered a mental hospital in Montreal for treatment of a recurrent illness from which he had suffered for many years. He remained in hospital for some seven weeks. Mr. Cardenas, a highly intelligent and articulate man, testified before the Board that he had been hospitalized a number of times in Cuba and in the United States because of this illness, which had been diagnosed as chronic undifferentiated schizophrenia. In Canada, however, his illness was diagnosed as "acute situational maladjustment". In support of this statement, he filed a letter dated January 3, 1969, on the letterhead of the Douglas Hospital, Montreal, addressed to his counsel (Exhibit A at the hearing on January 6, 1969), in the following terms:

" DOUGLAS HOSPITAL HOPITAL DOUGLAS

January 3, 1969.

Mr. Denis Brown,
380 Frank Street,
Ottawa, Ontario.

Dear Mr. Brown:

I am enclosing a copy of the letter originally sent to the American Consulate in Montreal. I believe that its content is still valid in regard to the Psychiatric Assessment of Mr. Belt. I hope this will be of some help.

Yours sincerely,

Barbara Higgins (signed)

For L. Vacaflor, M.D.,
Senior Psychiatrist."

The copy of Dr. Vacaflor's letter to the United States Consulate General, dated February 27, 1968, contains the statement

"He (the appellant) is now recovered and should be able to continue operating at the level of his intellectual abilities.

Diagnosis: Acute Situational Maladjustment (326.3 International Classification)."

Mr. Cardenas explained this last diagnosis (transcript of hearing January 7, 1969, page 19):

"This is not insanity, it is not a psychosis, it is not even a neurosis. It is a character disorder."

The appellant also testified that for many years he had wanted to be admitted as a permanent resident in the United States, where his mother, sister and brother-in-law and other relatives reside, but that he had been given to understand that because of his mental condition he would be absolutely barred from admission to that country. He therefore made no effort to obtain a United States immigrant visa during his residence in England. After he came to Canada as a non-immigrant visitor, he discovered that there was a waiver provision in the United States Immigration and Nationality Act which might be applicable to him and he then, at about the same time as he applied for permanent residence in Canada, applied for a United States immigrant visa at the Consulate General of the United States in Montreal. He filed with the Board a letter under the letter-head of the Consulate, dated January 3, 1969, apparently signed by Janet M. Ansorge, Vice Consul, addressed to his counsel, the first paragraph of which reads as follows:

"I refer to our telephone conversation of January 3, 1969 regarding Mr. Jorge Alfredo Belt y de Cardenas. Mr. Belt was refused an immigrant visa at this office under Section 212(a)(4) of the Immigration and Nationality Act. Section 212(a)(4) of the Act relates to aliens "afflicted with psychopathic personality, or sexual deviation, or a mental defect." Mr. Belt was found ineligible as a person afflicted with a "Mental Defect, Schizophrenic Reaction, residual type." A refusal under this section of the law is statutory and permanent in nature. There is no relief available."

Mr. Cardenas testified before the Board that, while he still wanted to go to the United States to live, if he could not be admitted there he wanted to remain in Canada, where he is reasonably close to his relatives. He does not wish to return to England; he was very unhappy there and opportunities for work in his chosen field are poor. He cannot return to Cuba. Although he himself was not active in politics, members of his family were, one uncle having been Cuban Ambassador to the United States under the pre-Batista regime. Before the Castro regime came into power, the family belonged to what Mr. Cardenas termed the Cuban Establishment, and as a member of that family the appellant would now be in danger of persecution and imprisonment if he returned to his native land. He testified that some relatives are presently serving jail sentences in Cuba, because of their political affiliations.

On December 6, 1968, the appellant tried to get into the United States by bus, crossing from Windsor to Detroit. He was interviewed briefly by the United States Immigration officials at the border post, and was refused entry. He immediately returned to Windsor, where an examination by a Canadian Immigration Officer resulted in the section 23 report filed as an exhibit to the summary of the further examination conducted by the Special Inquiry Officer. The summary of this examination shows that Mr. Cardenas told the Special Inquiry Officer that he was seeking admission to Canada as an immigrant. He confirmed this at the hearing of his appeal. The deportation order, above quoted, was made against him the same day, December 6, 1968.

It will be noted that the Special Inquiry Officer conducted a further examination, not an inquiry, in respect of the appellant. The relevant section of the Immigration Act is section 24, which reads as follows:

- "24(1) Where the Special Inquiry Officer receives a report under section 23 concerning a person who seeks to come into Canada from the United States of America, Alaska or St. Pierre and Miquelon, he shall, after such further examination as he may deem necessary and subject to any regulations made in that behalf, admit such person or let him come into Canada or make a deportation order against such person, and in the latter case such person shall be returned as soon as practicable to the place whence he came to Canada.
- (2) Where the Special Inquiry Officer receives a report under section 23 concerning a person, other than a person referred to in subsection (1), he shall admit him or let him come into Canada or may cause such person to be detained for an immediate inquiry under this Act."

In the circumstances of this case, the Special Inquiry Officer had no authority to conduct a further examination rather than an inquiry, unless it can be shown that Mr. Cardenas was a person seeking "to come into Canada from the United States of America". The appellant was refused entry into the United States at the United States Border post. Presumably he had physically crossed the geographical boundary between the two countries, and Mr. Craddock, who very properly drew the Board's attention to the problem, argued that the words "from the United States" in section 24(1) had a geographical connotation, and that therefore the Special Inquiry Officer was right in proceeding under that subsection. In support of this contention, he cited the case of *Baruch v. the Minister of Manpower and Immigration*, Immigration Appeal Board, August 8, 1968, unreported. The facts of this case are as follows: Baruch, a citizen of Israel, was admitted to the United States in June 1967, and resided there, legally, until June 9, 1968, when he was admitted to Canada as a non-immigrant visitor until June 26, 1968. On June 28, 1968, he endeavoured to return to the United States, but was refused entry at the border, and returned to the Canadian Immigration border post, where a further examination was held and a deportation order issued against him. His appeal was dismissed. During the hearing of the appeal, there was some discussion between Mr. N. Thurm, counsel for the respondent and the Chairman at the hearing, Mr. J.-P. Geoffroy, and the members of the panel. This is to be found at pages 8, 9 and 10 of the transcript, and is as follows:

"BY CHAIRMAN:

I wonder why this man has not been completely examined through a Special Inquiry; why has he been only dealt with by further ...

BY MR. THURM:

I believe that is because he is coming from the United States and under Section 23, if he is coming from the United States, he is dealt with by a further examination.

BY CHAIRMAN:

At that time he was in Canada.

BY MR THURN:

No, he had gone from Canada to the United States. He got as far as the U.S. immigration station and was sent back to Canada. Once he left the U.S. immigration station he is out of Canada but he was returning again.

BY CHAIRMAN:

This is the problem. Can you say that you have left the country from where you come from.

BY MR. THURM:

I would think so. I do not think we can take the position that the U.S. immigration office is in Canada, it has to be out of the country. Surely when he crosses the boundary he is out of the country.

BY CHAIRMAN:

Legally.

BY MR. THURM:

Yes.

BY CHAIRMAN:

Even though he is not admitted in that country?

BY MR. THURM:

Yes, Even though he was not legally admitted to the United States. His period, when he came on June 9th, was to June 26th. That period had expired when he returned to the United States but I think he was out of the country, he was in the United States, and that brings him within Section 23 as a person coming to Canada from the United States so a further examination procedure would be the right procedure.

BY MR. WESELAK:

The fact he was physically out of the country?

BY MR. THURM:

Yes. I think that could be the only interpretation you could put on that provision.

BY CHAIRMAN:

This surprised me, the question is how can you say someone is in another country when he has not been admitted into this country. I am speaking of it legally. One can put one's feet across the border but there is no very rigid line. You can never say the American Port of Entry right on the line or fifteen feet from the line do you have to get into the country. I was not thinking in terms of physical situation or geography but in terms of legally speaking. When you are not allowed to get into a country can you say that you have been in this country?

BY MR. THURM:

Coming from that country. I think so. He had passed through the Canadian immigration station and customs. He had passed out of Canada. He must have passed somewhere and the only place he could go was the United States.

BY CHAIRMAN:

Suppose the Port of Entry in Canada is a hundred feet from the border, from the line, and suppose that the American Port of Entry is right on the line, and you are not allowed to open the door because you are being told by the United States 'we won't admit you'.

BY MR. THURM:

That is a rather unusual situation. My recollection of the Ports of Entry is that the door is usually on the side that runs not parallel to the Boarder but at right angles to it and in order to get to the door you would have to be in the United States. I was trying to remember the section in the Immigration Act but there are some provisions that recognize the difference between coming through the United States to Canada and coming from the United States. Of course, that does not apply here either. He was not coming through the United States because he just went there and came back but I would think the physical presence, across the border in the United States, is all that is necessary for the purposes of Section 23."

The Board's judgment was rendered orally by the Chairman. The relevant part of this judgment reads (page 25 of the transcript):

"The Board, after considering the evidence and the arguments, came to the conclusion that because of the fact that the Appellant's non-immigrant visa had expired on the 26th of June and that he had applied for a new non-immigrant visa, the Examining Officer was right to consider him as a person seeking admission to Canada and seeking admission as of his first entry, meaning coming from the United States."

The Baruch case is clearly distinguishable from the instant appeal. Baruch had originally come into Canada from the United States, where he had actually resided, and he was therefore considered as seeking admission to this country "as of his first entry". By implication, the second "entry" was no entry, since he had been refused admission to the United States at that time.

The Board's decision in the case of Grabczak v. Minister of Manpower and Immigration (Immigration Appeal Board, October 25, 1968, unreported) is of interest. There the appellants, a mother and son, who were legal visitors to the United States and temporarily residing there, were admitted to Canada as non-immigrant visitors for a weekend, to visit Niagara Falls. On the Sunday, they sought to return to the United States and were refused admission. They came back to the Canadian Immigration border post requesting admission to Canada as non-immigrants for an indefinite period. A section 23 report was made and after a further examination, deportation orders were issued against them. Their appeals were allowed. In its reasons for judgment, given by J.C.A. Campbell, Vice-Chairman of the Board, the Board held (at pages 2 and 3)

"There is nothing contained in the summary of the further examination which states definitely when their non-immigrant status in Canada was to expire on Sunday, 1st September. When they crossed the geographical border between our two countries and sought admission into the United States of America they were still, in the opinion of the Board, legally in and remained in Canada, for the purposes of the Immigration Act, unless and until they had been admitted legally into the United States. Crossing the geographical border is, in itself, not sufficient to cause these appellants to lose their legal status in Canada.

The Board finds that the appellants had not lost their legal status as non-immigrants in Canada. They were not therefore persons "seeking to come into Canada" and the provisions of section 23 of the Immigration Act did not apply to them. It follows therefore that the Special Inquiry Officer did not have jurisdiction to issue the two deportation orders."

It must be noted that in the Grabczak case, it was the interpretation of the words "seeking to come into Canada" in section 23 of the Immigration Act that was the point directly in issue. The Grabczaks failed to come within this provision when they crossed the Rainbow Bridge into Canada the second time, since they were already in Canada, since they had been admitted as non-immigrants the previous day and had not left Canada before the expiry of their non-immigrant status. The basic principle, however, is clearly stated, namely that the mere

crossing of the geographical border between Canada and the United States does not imply departure from Canada, or subsequent re-entry into this country, unless and until the person concerned has been "legally (i.e., not merely geographically) admitted into the United States".

In the case of *Spann v. Minister of Manpower and Immigration* (Immigration Appeal Board, December 5, 1968, unreported), the female appellant, a landed immigrant in Canada, endeavoured to enter the United States at a border post and was refused. She returned to the Canadian Immigration border post, where a section 23 report was made, followed by a further examination which resulted in a deportation order. Her appeal was allowed. In its reasons for judgment, handed down by M. J.-P. Houle, member, the Board held (pages 3 and 4):

"L'enquête complémentaire prévue à l'article 24(1) n'a lieu que dans les cas de personnes qui cherchent à venir au Canada des Etats-Unis d'Amérique, de l'Alaska ou de Saint-Pierre-et-Miquelon. La question se pose de savoir si l'appelante tombe dans une telle catégorie de personnes? A cette question précise posée par le président audienier le procureur de l'intimé a répondu:

"This has been a problem with the Department in previous occasions and the Department has had to adopt the position that a person who crosses the International Boundary into the United States has physically left the country. And on their return, if they have been refused by United States Immigration authorities, even though they have technically been at the door knocking, seeking admission to that country and have been denied, they are in effect on their return to Canada seeking to come into this country."

- Chairman: In sort of a limbo?"
- "Mr. Lepitre: they are in sort of a limbo, yes."
- "Chairman: Is that possible?"

Le procureur de l'intimé fit ensuite référence, sans autre mention, à l'affaire *George Christian Hannah* mais n'a pas élaboré sur la pertinence de cette affaire au présent appel.

La prétention du procureur de l'intimé, en cette matière, ne résiste pas à l'examen. Il déclare tout d'abord qu'il s'agit d'une position prise par le ministère et le contexte suggère une position prise arbitrairement; à tout le moins le procureur de l'intimé ne donne aucun fondement juridique à cette position.

Retenons bien les terme de sa déclaration:

"a person who crosses the International Boundary into the United States has physically left the country. And on their return, if they have been refused by United States Immigration authorities, even though they have technically been at the door knocking, seeking admission to that country and have been denied..."

(le souligné est mien).

Les termes de cette déclaration sont contradictoires; on ne peut à la fois se voir refuser l'admission et être admis. Le passage "physique" sur la limite séparant deux états, ce qui est proprement la définition de frontière, ne saurait, dans l'opinion de la Commission, créer une fiction légale fondant un rapport d'un officier d'immigration en vertu de l'article 23 et la tenue d'une enquête complémentaire sous l'article 24(1) de la Loi sur l'immigration.

En conséquence la Commission arrête que le rapport de l'officier d'immigration, dans l'instance, est non valide et nul et entraîne la non validité et la nullité de l'enquête complémentaire et de l'ordonnance d'expulsion."

Mr. Craddock cited to the Board the case of *Tonner v. Minister of Manpower and Immigration* (Immigration Appeal Board, September 23, 1968, unreported), but in that appeal the Board found it unnecessary to deal with the point at issue in the present appeal.

The Spann case would appear to be almost on all fours with the present appeal. It is true that Mrs. Spann had legal status in Canada - she was a landed immigrant, while Mr. Cardenas has and had at the date of the deportation order, no legal status in this country. However, in determining whether a person seeking to come into Canada from the United States of America, Alaska or Saint-Pierre-et-Miquelon, in respect of Section 24(1) the immigration status of such person in Canada - whether he has or has not legal status in this country - is totally irrelevant. The only question is whether he was ever "in" the countries named, not geographically, but in a legal sense, so as to be said to come "from" such countries to Canada.

In the instant appeal, Mr. Cardenas was refused entry to the United States at the United States border post. He was never "in" the United States in the sense that he could be treated as coming "from" that country within the meaning of section 24(1). On December 6, 1968, he was a person seeking to come into Canada, probably (as suggested by the decision in *Baruch v. Minister of Manpower and Immigration*) technically "from" England, since he was originally legally entered in Canada as a tourist from that country, although it is not necessary to decide this. He therefore fell within the provisions of section 24(2), not section 24(1), of the Immigration Act, and the correct procedure in his case was an inquiry rather than a further examination.

In *De Marigny v. Langlais* (1948) S.C.R. 155, Rand J. said: "In the administration of the Immigration Act, what is to be looked for and required is a compliance in substance with its provisions ... *Samejima v. R.* (1932) S.C.R. 640, shows that this Court will not hesitate to condemn 'hugger mugger' proceedings ... or proceedings in which a defect in substance appears."

The use of a further examination rather than an inquiry in respect of Mr. Cardenas was not compliance in substance with the provisions of the applicable section of the Immigration Act - section 24(2) - it was not compliance at all. It was a fundamental defect in substance, going to the root of the whole proceedings leading up to and flowing from the deportation order. The deportation order made against the appellant on December 6, 1968, is therefore null and void, and the appeal is allowed.

As noted above, the appellant has no legal status in Canada. If the Board had the power to do so, it would be disposed, in the circumstances of this case, to grant the appellant legal status in Canada. The Board is, however a creature of statute, and its only powers in this regard are those set out in section 15 of the Immigration Appeal Board Act which reads in part:

"15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that"-

and here the various grounds for special relief are set out-

"the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The Board can therefore land or enter an appellant, i.e., regularize his status in Canada, if grounds for doing so exist, only if it dismisses an appeal or itself makes a deportation order pursuant to section 14(c) of the Immigration Appeal Board Act. It has no such power if it allows an appeal - a serious lacuna in the Act, which can only be corrected by Parliament.

Appeal allowed.

Counsel:

For the appellant: D. Braun

For the respondent: F.D. Craddock, Department of Manpower and Immigration

Giuseppe FOLINO (and son) appellants and

The Minister of Manpower and Immigration, respondent.

Decision: April 23, 1969
(File: 69-21)

Coram: J.-P. Houle, U. Benedetti, J.A. Byrne

Prohibited class: persons who have been convicted of or admit having committed any crime involving moral turpitude - Crime - Moral turpitude. - Denial of natural justice: inquiry commenced by one Special Inquiry Officer and completed by another Special Inquiry Officer. - Immigration Act: S. 5(d); 11(2)(3); 19(2); 70. - Immigration Appeal Board Act: S. 14(b); 15(1)(a).- Juvenile Delinquents Act(R.S.C.,1952. Chap. 160): S. 33

Catégorie prohibée: personnes qui ont été déclarées coupables d'un crime impliquant turpitude morale ou qui admettent avoir commis un tel crime - Crime - Turpitude morale - déni de justice: enquête ouverte par un enquêteur spécial et terminée par un autre enquêteur spécial.-Loi sur l'immigration: Art. 5(d);11(2)(3) 19(2); 70.- Loi sur la Commission d'appel de l'immigration: Art. 14(b); 15(1)(a).- Loi sur les jeunes délinquants (S.R.C.,1952. Chap. 160): Art. 33

Held:- Crime is not defined in the Criminal Code but the Criminal Code is not exhaustive of the criminal law and S. 5(d) of the Immigration Act refers to any crime involving moral turpitude. Contributing to juvenile delinquency is certainly an act or conduct prejudicial to the community, the commission of which by S. 33 of the Juvenile Delinquents Act renders the person liable on summary conviction before a Juvenile Court or a magistrate to fine or to imprisonment or to both; by its inherent nature it is an act of baseness, vileness and depravity in the private and social duties which a man owes to his fellow man or to society in general; it is a crime involving moral turpitude.

An inquiry was commenced and adjourned without the merits of the case having been discussed; adjournment was proper and "rights" of the subject were not affected; there has been no denial of natural justice.

Arrêt:-Le crime n'est pas défini dans le code pénal mais celui-ci n'est pas exhaustif de la loi pénale et à l'article 5(d) de la Loi sur l'immigration, il est question de tout crime impliquant turpitude morale. Induire un enfant à commettre un délit est, sans aucun doute, avoir une conduite ou commettre un acte qui, selon l'article 33 de la Loi sur les jeunes délinquants, rend son auteur passible, après déclaration sommaire de culpabilité devant une Cour pour jeunes délinquants ou devant un magistrat, d'une amende d'au plus cinq cent dollars ou d'un emprisonnement pendant au plus deux ans, ou à la fois de l'amende et de l'emprisonnement; il s'agit d'un acte intrinsèquement mauvais, bas et dépravé qui cause préjudice grave à un individu ou à la société; c'est un acte impliquant turpitude morale.

Une enquête fut ouverte puis suspendue sans que l'affaire ait été discutée au mérite; la suspension d'enquête était opportune et les "droits" du sujet de l'enquête n'en ont pas été touchés: il n'y a pas eu déni de justice.

Le jugement de la Commission fut rendu par:
The judgment of the Board was delivered by:

J.-P. Houle:-

The order of deportation reads as follows:

- (1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile;
- (3) you are a person described in subparagraph (v) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you have, since your admission to Canada, become a person who, if you were applying for admission to Canada, would be refused admission by reason of your being a member of a prohibited class other

than the prohibited classes described in paragraphs (a), (b), (c) and (s) of Section 5, namely, paragraph (d) of Section 5 of the said Act - persons who have been convicted of or admit having committed any crime involving moral turpitude and your admission to Canada has not been authorized by the Governor in Council;

146

- (4) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act.

The appellant, aged 33, is a citizen of Italy, married in 1961 and there are two children, Antonio, born in Italy and Filippo, born in Canada on August 3rd, 1966. The son Antonio, aged 5, being an Italian citizen and deemed to be dependent for support upon his father has been included in the order of deportation. The appellant, his wife and son, Antonio, were granted the status of landed immigrants in Canada on March 21st, 1965.

On the 11th day of April 1968, Giuseppe Folino was convicted before a Magistrate for that he the said Giuseppe Folino did between the 15th day of January, 1968, and the 1st day of February, 1968, unlawfully, knowingly and wilfully do an act contributing to the child (.....) or likely to make the aforesaid child a juvenile delinquent by engaging in an act of sexual immorality with the aforesaid child; contrary to Section 33 of the Juvenile Delinquents Act. Folino was sentenced to pay the sum of \$300.00 (Copy of certificate of conviction on record). It should be noted here, and for further reference, that Folino had entered a plea of guilty and was represented before the Magistrate by Counsel, Mr. Guy Ungaro.

A report under Section 19 of the Immigration Act was made on 26th day of June 1968 and on same day and in pursuance of Section 26 of aforesaid Act the holding of Inquiry was directed.

The appellant is contesting the legal validity of the order of deportation and his appeal is primarily based upon legal grounds, that there were defects in the hearing leading to the deportation order, that it should not have been made. More specifically, the appellant contends that:

1.- the deportation order itself was not in accordance with the rules of natural justice in that the inquiry was commenced by one Special Inquiry Officer and completed by a second Special Inquiry Officer. By Counsel at pages 20 and 21 of transcript of evidence:

"And I submit that the breaking up of the case into two different immigration officers makes it a clear denial of natural justice. It affects the ability of the officer to assess the credibility of material presented at the previous case before the previous SIO. And notwithstanding the fact it may have matters of little importance, it is very important in this court as in any other court that not only should justice be done, but it should appear to be done, and perhaps justice was done but by breaking up the two immigration officers it does not give the appearance of justice. And it is on that legal ground that I suggest the deportation order should be quashed."

2.- the offence of contributing to juvenile delinquency, even though it does specify an immoral act, does not come under Section 5(d) of the Immigration Act.

"I take issue is the word "crime" and I suggest that the word "crime" should be interpreted as meaning a crime under the Criminal Code. It is well known that a juvenile delinquents act was specially enacted by the Government to provide an alternative to a criminal record for juveniles. It was specifically set up so that juveniles would not be caught under the Criminal Code and thereby be given a criminal record.

Now contributing to juvenile delinquency is one part of that Act and I am suggesting to you that that Act is specifically designed to come away from the Criminal Code, it should not be called a crime within the meaning of Section 5(d). Therefore the appeal should be quashed since 5(d) has no application and Mr. Folino would then not come under any of the provisions of Section 19."

Dealing with appellant's first legal argument: that the order of deportation should be quashed because there has been a denial of natural justice in breaking up the case into two different immigration officers.

On 14th August, 1968, an inquiry concerning Giuseppe Folino was held under the provisions of the Immigration Act by SIO, V.R. Brown at the Immigration Office in Niagara Falls, Ontario, (Minutes of the Inquiry on record). Folino is present and accompanied by his counsel, Mr. Guy Ungaro, Barrister.

At page 2 of the Minutes, one reads: "The purpose of this inquiry is to determine whether you are a person who may be allowed to remain in Canada and in the event a decision is reached that you are not such a person an order shall be made for your deportation from Canada (*italics are mine*).

Q. Do you understand why this inquiry is being held?

A. Yes.

Pages 3, 4 to the bottom of page 5, deal with identification of counsel, identification, marital status, address of subject.

Then, starting at bottom of page 5 to page 7 inclusive:

Q. Have you been convicted of an offence since being admitted to Canada as an immigrant?

A. No.

By Counsel:

On the understanding that "an offence" is not a criminal offence, the answer is yes.

By Special Inquiry Officer to person concerned:

I refer to attachment 2 to Exhibit 'A' which is a certificate of conviction dated 15 May 1968 at Niagara Falls, Ontario, and signed by Jack Irwin, Court Clerk, which indicates that one Giuseppe Folino of 2551 Ash Street, Niagara Falls, Ontario, was convicted on 11 April 1968 before Magistrate J.L. Roberts -

By Counsel:

It was not Magistrate Roberts, it was Begora.

By Special Inquiry Officer:

- for that the said Giuseppe Folino did between the 15th day of January 1968 and the 1st day of February 1968, at the City of Niagara Falls in the County of Welland unlawfully knowingly and wilfully do an act contributing to the child, to wit: Susan Washburn, or likely; to make the aforesaid child a juvenile delinquent by or engaging in an act of sexual immorality with the aforesaid child. Contrary to the provisions of the Juvenile Delinquents Act. And it was adjudged that the said Giuseppe Folino for his said offence to forfeit and pay the sum of \$300.00 to be paid and applied according to law.

Q. Does this refer to you?

A. No.

By Counsel:

I think I should explain. Although he has admitted to an offence this certificate of conviction is incorrect. For one thing the address is wrong, secondly the Magistrate is incorrect, and the offence itself is not that to which he pleaded guilty. That certificate does not apply, it is incorrect.

By Special Inquiry Officer to Counsel:

Q. Do I understand you correctly Sir, that this certificate of conviction is not a true and correct copy of the actual conviction?

A. That is correct.

Q. You said your client was not convicted before Magistrate Roberts?

A. I believe it was Magistrate T.R. Begora, and the conviction did not show the offence stipulated on this, with the act of contributing. I think the safest thing is to get a transcript of the case testimony, that would be the best thing.

By Special Inquiry Officer:

I will adjourn the inquiry and endeavour to obtain a correct, certified true copy of the certificate of conviction. (italics are mine)

(Inquiry adjourned)

(Inquiry resumed)

Counsel to person concerned and Special Inquiry Officer proceeded to the Magistrate's Court, Niagara Falls, where it was learned that the Court Clerk was out of town today, the Magistrate or Magistrates involved were not available as they were both out of town, and the Court Reporter was on annual vacation.

By Special Inquiry Officer to Counsel:

I will adjourn this inquiry until a later date and obtain a certified true copy of the certificate of conviction. Mr. Folino and yourself will be advised of the date on which the inquiry will be resumed.
(italics are mine)

By Special Inquiry Officer to person concerned:

I will release you on a bond for conditional release in the amount of \$500.00 in which you will be required to report to this office in person every two weeks commencing 28 August 1968, or as instructed.

(Inquiry adjourned)

It is evident from the reading of those minutes that:

a) an inquiry was commenced and was adjourned; b) adjournment was to obtain a correct, certified true copy of a certificate of conviction, which certificate contributes an essential document in this case. It is my view that adjournment was proper and made pursuant to Section 11(3)(e) of the Immigration Act; "A Special Inquiry Officer may, for the purposes of an inquiry do all other things necessary to provide a full and proper inquiry." Furthermore, it should be stressed that at that stage the merits of the case have not been examined, less discussed, in other words the SIO Brown has started an inquiry but has determined nothing (See Section 11(2) of the Immigration Act); at the time of the adjournment the only things which have been ascertained are the identification of subject and his counsel and the impropriety and incorrectness of a certificate of conviction. The "rights" of the subject were left untouched. In any case a Special Inquiry Officer is not a persona designata and in this instance I fail to see even the shadow of a denial of natural justice when Special Inquiry Officer J.A. Cummings commenced his inquiry on November 1st, 1968. First legal argument of appellant is therefore defeated.

Dealing with second legal argument: the offence of contributing to juvenile delinquency, even though it does specify an immoral act, does not come under Section 5(d) of the Immigration Act, and the appellant would then not come under any of the provisions of Section 19. Section 5(d) reads: "No person shall be admitted to Canada if he is a member of any of the following classes of persons:

Persons who have been convicted of or admit having committed any crime involving moral turpitude ..."

Relevant parts of Section 19 are:

"19.(2) Every person who is found upon an inquiry duly held by a Special Inquiry Officer to be a person described in subsection (1) is subject to deportation".

One has to recall that Folino has pleaded guilty to a charge of contributing to a child's being or becoming a juvenile delinquent or likely to made a child a juvenile delinquent (Section 33 Juvenile Delinquents Act). Now, whether the entering of a plea of guilty has been part of the strategy used by Folino's

counsel is irrelevant, here, and it is not for the Board to pronounce on that matter. On file there is a certificate of conviction to the effect that Folino "did knowingly and wilfully do an act contributing to the child (.....) or likely to make the aforesaid child a juvenile delinquent by engaging in an act of sexual immorality with the aforesaid child: contrary to Section 33 of the Juvenile Delinquents Act." And for the said offence Folino had to pay a fine of \$300.00. Therefore the only matter to be determined is: does the offence for which Folino has been convicted constitute a crime involving moral turpitude as per Section 5(d) of the Immigration Act?

Learned counsel for the appellant has argued that the word "crime" should be interpreted as meaning a crime under the Criminal Code. Well, crime is not defined in the Criminal Code but the Criminal Code is not, by any means, exhaustive of the criminal law and Section 5(d) of the Immigration Act refers to any crime involving moral turpitude. The "Concise Law Dictionary" by Osborn defines crime: "A crime may be described as an act, default or conduct prejudicial to the community, the Commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings, normally instituted by officers in the service of the Crown". Contributing to juvenile delinquency is certainly an act or conduct prejudicial to the community, the commission of which by Section 33 of the Juvenile Delinquents Act renders the person liable on summary conviction before a Juvenile Court or a magistrate to fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment. Thus, one may conclude that Folino has been convicted of a crime. Is it a crime involving moral turpitude? Learned counsel for the Respondent has cited an abundant jurisprudence but suffice it to say that the Board in numerous cases, has recognized and pronounced that moral turpitude includes everything done contrary to justice, honesty, modesty or good moral; to fall within the category of crime involving moral turpitude an act to be by its inherent nature an act of baseness, vileness, depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

To knowingly and wilfully do an act contributing to a child or likely to make a child a juvenile delinquent by engaging in an act of sexual immorality with the aforesaid child, is doing an act contrary to justice, honesty, modesty and good moral and which by its inherent nature is an act of baseness, vileness and depravity. Therefore, the second legal argument of the appellant is also defeated.

Held: The order of deportation made against Giuseppe Folino is in conformity with the law and the appeal should be dismissed pursuant to Section 14 of the Immigration Appeal Board Act.

The appellant has also pleaded under Section 15 of the Immigration Appeal Board Act and has requested the Board to exercise its discretionary powers.

The appellant is a landed immigrant since 1965 and therefore decision has to be rendered having regard to all the circumstances of his case, in pursuance of Section 15(1)(a) of the Immigration Appeal Board Act.

The appellant, aged 33, is a married man having the whole of his family with him in Canada; by trade he is a bricklayer and a construction labourer and has been steadily employed since his coming to Canada and having the full confidence of his employer; in 1968 the appellant bought a house with a \$4000. down payment and

would have now savings in the amount of \$300. or \$400.; appellant has no previous criminal or police record and there is evidence that his family life is a normal one and has not been disrupted or disturbed by the conviction dealt with above.

Evidence shows that it is on his counsel's advice and direction that Folino has entered a plea of guilt in order to avoid a lengthy court trial and that there have been several mitigating circumstances in his case.

For some reasons unknown to the Board, the Special Inquiry Officer had decided not to include the appellant's wife in the order of deportation although she has admitted at the inquiry that she is dependent on her husband for her support and so is, for that matter, the Canadian born child.

The other son, Italian born, has been included in the order of deportation as being dependent upon his father for his support. To carry on the execution of the order of deportation would mean that the head of the family and one of his sons will be deported to Italy while the other dependents, the wife and a child will be permitted to stay in Canada. True the wife can choose to follow her husband and Section 70 of the Immigration Act provides that "The Minister may direct that costs of transportation from Canada be paid out of moneys appropriated by Parliament in the case of a person who should in the opinion of the Minister, be assisted in leaving Canada in order to avoid separation of a family as for other good cause...". However is it necessary to underline the fact that there is much more involved here than the defrayal of costs of transportation? And again one should not forget that the appellant, his wife and one of their sons, are landed immigrants; and that there is another son who is a Canadian citizen by birth.

Taking into account all the circumstances of this case, regardless to the legal points, the Board finds reasonable grounds to exercise its discretion.

- Decision: 1) The appeal is dismissed pursuant to Section 14 of the Immigration Appeal Board Act;
- 2) The order of deportation is quashed pursuant to Section 15(1)(a) of aforesaid Act.

Counsel:

For the appellant: G. Ungaro, Barrister and Solicitor

For the respondent: P. Betournay, Department of Justice

RESUMES

RÉSUMÉS

February 23, 1968

-

23 février 1968

Narcotics conviction - Notice of appellant's right to counsel on eve of Special Inquiry - Deportation order - Appeal barred at the time by Immigration Act - Immigration Appeal Board Act proclaimed - Appeal while still serving sentence. - Appeal valid since none made previously - Insufficient notice of right to counsel - In instant case, no prejudice - Request by respondent's counsel to ignore deportation order not valid. - Exclusive jurisdiction of the Board regarding deportation orders - Obligation to consider order in toto - Exceptions - Reference in Immigration Act to Opium and Narcotic Drugs Act. (1952 R.C.S. Ch. 210) - Interpretation Act in force at time of the order authorizes substitution by Narcotics Control Act. - Deportation order valid - Immigration Act: S.4, 11, 19(1)(d), 19(1)(e)(iii), 19(1)(4), 29, 30, 31; Immigration Board Act: 7, 11, 14, 22, 29, 33(a); I.A. Bd Act Rules: S. 4(3); Narcotics Control Act (1960-1) R.S.C. Ch. 35, S. 2(i), 3, 4; Inquiries Act: S. 13; Interpretation Act: (1967, 16 Eliz. II, c. 7) S. 20.

Condamnation en matière de stupéfiants - Avis à la veille de l'enquête du droit de l'appelant à un procureur - Ordonnance d'expulsion - Aucun motif d'appel à l'époque en vertu de la Loi d'immigration - Loi de la Commission d'appel de l'immigration promulguée - Appel durant emprisonnement. - Appel valide car aucun auparavant - Avis insuffisant du droit à un procureur - En l'espèce, aucun préjudice. - Requête du procureur de l'intimé de ne pas considérer partie de l'Ordonnance d'expulsion - Compétence exclusive de la Commission en matière de telles ordonnances - Exceptions - Référence à Loi d'immigration, à Loi sur l'opium et les drogues narcotiques (1952, S.R.C., Ch. 201) - Loi d'interprétation en vigueur à l'époque autorise substitution par Loi sur stupéfiants - Arrêté d'expulsion valide - Loi de l'immigration: Art. 4, 11, 19(1)(d), 19(1)(e)(iii), 19(1)(4) 29, 30, 31. Loi de la Commission d'appel de l'immigration: 7, 11, 14, 22, 29, 33(a); Loi de la Commission d'appel de l'immigration (Règlements): 4(3); Loi sur les stupéfiants (1960-1, S.R.C., Ch. 35) Art. 2(i), 3, 4; Loi des enquêtes: Art. 13; Loi d'interprétation: (1967, 16 Eliz. II, c. 7) Act. 20.

(Scott, Legaré, Weselak)

Appellant, John Stanley Martin (A.E. Golden, Barrister); Respondent, the Minister of Manpower and Immigration, (E.M. Thomas, Q.C.)

Appellant was convicted in January 1967 of trafficking in narcotics (marihuana) contrary to S. 4(1) of the Narcotics Control Act. One day before the special inquiry appellant was served with a notice advising him as to his right to counsel. He was ordered deported under S. 19(1)(d) of the Immigration Act - which refers to the Opium and Narcotics Drugs Act - on March 9, 1967. No Appeal was filed from this order, since such appeal was barred by SS. 30 and 31 of the Immigration Act (subsequently repealed by S. 29 of the Immigration Appeal Board Act). In December 1967, appellant filed an appeal with the Board.

Held:- The Board has jurisdiction to hear the appeal as none was made under the new Immigration Appeal Board Act, and as no grounds existed previously under Immigration Act. - Even though insufficient notice was given of appellant's right to counsel, no prejudice was suffered since said appellant waived such right at inquiry. - Counsel has no power to ignore portion of a deportation order even on consent of other party. The Board must deal with all grounds of an order which can only be amended by the Board after a hearing or by Special Inquiry Officer on a properly reopened inquiry. - The Board has exclusive jurisdiction regarding deportation orders and is not bound

by provincial courts' decisions - Under Interpretation Act in force at appropriate time, Narcotics Control Act must be substituted for Opium and Narcotic Drugs Act in reading sec. 19(1)(d) of Immigration Act, since offence of drug trafficking is subject matter of both.

Appeal dismissed.-

L'appelant fut condamné en janvier 1967 pour avoir fait le trafic de stupéfiants (marijuana) à l'encontre de l'article 4(1) de la Loi sur les stupéfiants. A la veille de l'enquête spéciale, il reçut avis de son droit à un conseiller. Une Ordonnance d'expulsion fut émise contre lui le 8 mars, 1967. Aucun appel de cette Ordonnance ne fut déposé, étant donné que les articles 30 et 31 de la Loi de l'immigration (modifiés par la suite par l'article 29 de la loi de la Commission d'appel de l'immigration) l'interdisaient. En décembre 1967, l'appelant déposa un appel auprès de la Commission.

Arrêt:- La Commission a compétence pour entendre l'appel puisqu'aucun autre ne fut fait en vertu de son statut et qu'aucun motif n'existait auparavant en vertu de la Loi de l'immigration pour ce faire. - En dépit de l'insuffisance d'avis à l'appelant quant à son droit à un procureur, il n'y a pas eu préjudice en l'espèce, car à l'enquête l'appelant renonça à ce droit - Un procureur ne peut, même avec l'assentiment de l'autre partie, ignorer une partie d'une Ordonnance d'expulsion. La Commission doit étudier tous les éléments de l'Ordonnance laquelle ne peut être modifiée par elle qu'après l'audition et par l'enquêteur spécial à une réouverture en bonne et due forme de l'enquête - La Commission a juridiction exclusive en matière d'Ordonnance d'expulsion et n'est pas liée par les décisions des cours provinciales - En lisant l'article 19(1)(d) de la Loi sur l'immigration il faut lire, en vertu de la Loi d'interprétation en vigueur à l'époque pertinente, Loi sur les stupéfiants pour Loi sur l'opium et les drogues narcotiques, étant donné que ces deux lois traitent du trafic des stupéfiants.-

March 19, 1968

-

19 mars 1968

Landed immigrant - Return to native country for a temporary purpose - Whether abandonment of domicile or status. - Time element. - Minister's permit. - Immigration Act: S. 4(2)(c).-

Immigrant reçu - Retour momentané au pays d'origine - Abandon de domicile ou d'état - Le facteur temps. - Emission d'un permis par le Ministre - Loi de l'immigration: Art. 4(2)(c).

(Scott, Campbell, Weselak).-

Appellant, William A. J. Foulger (J.A.W. Drysdale, Barrister & Solicitor)
Respondent, the Minister of Manpower and Immigration, (E.M. Thomas, Q.C.)

The appellant, an Australian citizen, and his family were admitted to Canada as landed immigrants in October, 1962. In January, 1964, the appellant and his wife and the two youngest children returned to Australia to sell their home there and to visit the appellant's father. The two older children remained in Canada. In July, 1967, the appellant sought to return to Canada, but the Canadian Immigration Office refused to recognize him as a landed immigrant, and new applications for landed immigrant status were filed. In September, 1967, a Minister's Permit was issued, valid for one month, to permit the appellant and his family to attend the wedding of his daughter in Canada.

the appellant failed to leave Canada on the expiration of the period designated by the permit and in November, 1967, a Section 19 Report was issued on the grounds of Section 19(1)(e)(vi) of the Immigration Act. - After an Inquiry a deportation order on the same ground was made in December, 1967. No deportation order was made in respect of the appellant's wife or younger children, although the same circumstances applied to them.

Held:- The return of a person with landed immigrant status to his native country for a temporary purpose does not constitute an abandonment of his place of domicile or status as an immigrant. - For the purpose of acquiring Canadian domicile time continues to run even while such person is away for temporary purposes. In this appeal, the appellant was domiciled in Canada before the Section 19 Report was issued. - The issuance of a Minister's Permit does not in the circumstances supersede the landed immigrant status previously acquired. It is a nullity. It does not affect the acquisition of domicile as provided under Section 4(2)(c) of the Act.- Appeal allowed.

L'appelant, citoyen d'Australie, et sa famille furent admis au Canada, à titre d'immigrants reçus, en octobre 1962. En janvier 1964, l'appelant, sa femme et deux jeunes enfants retournèrent en Australie pour y vendre leur propriété et rendre visite au père de l'appelant. Deux autres enfants, aînés des précédents, demeurèrent au Canada. En juillet 1967, l'appelant tenta de revenir au Canada mais le fonctionnaire à l'immigration refusa de le reconnaître comme immigrant reçu. De nouvelles demandes de résidence permanente furent faites. - En septembre 1967, le Ministre émit un permis, valide pour un mois, autorisant l'appelant et sa famille à assister au mariage, au Canada, de leur fille.- L'appelant ne quitta pas le Canada à l'expiration de son permis de séjour et, en novembre 1967, un rapport fut fait selon l'article 19 s'appuyant sur les dispositions de l'article 19(1)(e)(vi) de la Loi de l'immigration. - Après enquête, une Ordonnance d'expulsion s'appuyant sur les mêmes dispositions, fut émise. - Il n'y eut pas d'Ordonnance d'expulsion contre l'épouse et les jeunes enfants de l'appelant.

Arrêt:- Le retour momentané dans son pays d'origine, d'un immigrant reçu, n'emporte pas abandon de son lieu de domicile ni de son état. Aux fins d'obtenir le domicile canadien, il n'y a pas de solution de continuité même si la personne est absente momentanément. Dans cette affaire l'appelant était domicilié au Canada avant que ne soit émis le rapport selon l'article 19. - Le permis par le Ministre n'efface pas, dans les circonstances, l'état d'immigrant auparavant acquis. Ce permis est de nul effet et n'entache pas l'acquisition du domicile, telle que prévue à l'article 4(2)(c) de la Loi d'immigration. - Appel accueilli.

April 9, 1968

-

9 avril 1968

person who "resides or may be" in Canada - The place where a person is to be deported is not part of a deportation order, and the Board has no jurisdiction in this regard. - Matters which precede the making of the order and the order as such only to be considered by the Board. - Crime outside Canada involving moral turpitude: foreign law and Canadian law.- Presumption. - onus of proof. - Moral turpitude: definition. Immigration Act: S.5(d); 19(1)(e)(ix); 26.-

personne qui demeure ou peut être au Canada. - L'endroit où une personne doit être déportée ne fait pas partie de l'Ordonnance d'expulsion et la Commission n'a pas compétence en cette matière. - La Commission ne considérera que les circonstances pertinentes à l'Ordonnance et l'Ordonnance elle-même.- Crime à l'étranger, impliquant turpitude morale: loi étrangère et loi canadienne - Présomption - Fardeau de la preuve. - Turpitude morale: définition. - Loi sur l'immigration: Art. 5(d);19(1)(e)(ix); 26.-
(Weselak, Scott, Campbell)

Appellant, Donald Edwin Moore (L.D. Silver & A.C. Bazos, Barristers and Solicitors) Respondent, the Minister of Manpower and Immigration (N.M. Thurm, Barrister and Solicitor).

The appellant, an American citizen, was ordered deported under Section 5(d) and Section 19(1)(e)(ix). Evidence was produced showing some 49 convictions in the United States, including theft. The appellant was detained for an inquiry when he was on the point of departure from Canada for his home in Panama.

Held:- Section 19(1) refers to a person who "resides or may be" in Canada. As the appellant was physically in Canada when he was detained for the inquiry, and as the inquiry was properly convened in accordance with Section 19 and Section 26, the Special Inquiry Officer was fully clothed with jurisdiction to hold the inquiry.

The place where a person is to be deported is not part of a deportation order, and the Board has no jurisdiction in this regard. On an appeal from a deportation order the Board can only consider matters which precede the making of the order and the order as such.

In considering whether a foreign conviction relates to a "crime involving moral turpitude" the presumption that foreign law is the same as Canadian law, unless proof of the contrary is adduced, must be applied. The crime, however, must be recognizable as a crime in Canada, i.e. it must be identifiable as one of the crimes defined in the Criminal Code or other Canadian Criminal Statute. If it is not, the onus is on the party alleging the crime, - the Minister - to prove that it is such. If it is, the onus is on the party seeking to disprove its criminal nature - the appellant - to prove the foreign law as a fact. If the appellant fails to satisfy this onus, the presumption applies.

"Moral turpitude" is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rules of right and duty between man and man. It must be determined according to Canadian standards. Theft is a crime involving moral turpitude.

Appeal dismissed.-

Appeal to the Supreme Court of Canada: dismissed ...

Une ordonnance d'expulsion fut émise en vertu des articles 5(d) et 19(1)(e)(ix) de la Loi sur l'immigration contre l'appelant, un citoyen américain. En preuve: quelques 49 condamnations aux Etats-Unis, dont une pour vol. L'appelant fut détenu pour une enquête alors qu'il était sur le point de quitter le Canada pour aller chez lui au Panama.

Arrêt: L'article 19(1) se rapporte à une personne qui "demeure ou peut être" au Canada. Etant donné que l'appelant était physiquement au Canada lorsqu'il fut détenu pour l'enquête, et que celle-ci fut convoquée selon les articles 19 et 26, l'enquêteur spécial avait toute la juridiction nécessaire pour tenir une enquête.

L'endroit où une personne doit être déportée ne fait pas partie de l'ordonnance d'expulsion et la Commission n'a aucune compétence en la matière. Lors d'un appel la Commission ne peut considérer que les faits qui ont précédé l'émission de l'ordonnance d'expulsion et l'ordonnance comme telle.

En jugeant si, oui ou non, une condamnation faite en dehors du pays en est une pour "un crime comprenant turpitude morale" on doit présumer que la Loi étrangère est la même que la loi canadienne, à moins qu'on prouve le contraire. Le crime, cependant, doit être reconnu au Canada comme un crime i.e. l'un des crimes qui tombent sous le

Code pénal ou sous d'autres statuts pénaux canadiens. S'il ne s'agit pas d'un tel crime, le fardeau de la preuve qu'il en est un impliquant turpitude morale, appartient à qui porte l'accusation - le ministère; au cas contraire il appartient à qui cherche à se disculper, - l'appelant - de prouver qu'il ne s'agit pas d'un crime impliquant turpitude morale, et ce, en prouvant la loi étrangère. Si l'appelant faillit à cette tâche, la présomption joue contre lui.

La "turpitude morale" est un acte de bassesse, de lâcheté ou de dépravité dans les devoirs privés et sociaux qu'un homme doit à ses concitoyens ou à la société en général, et contraire aux lois habituelles et acceptées des droits et devoirs de l'homme envers l'homme. Elle doit être déterminée selon les normes canadiennes. Le vol est un crime impliquant la turpitude morale.

Appel rejeté.-

Dont appel à la Cour suprême du Canada: rejeté.-

September 23, 1968

-

23 septembre 1968

Not entering from the United States. - Domicile: animus reliquendi.-

Immigration Act: S. 3(2); 4; 24(1); 27(1)(2).-

Ne venant pas des Etats-Unis. - Domicile: animus relinquendi. - Loi sur

l'immigration: Art. 3(2); 4; 24(1); 27(1)(2).-

(Campbell, Legaré, Byrne)

Appellant, Francis Ian Tonner. (G.P. Killeen, Barrister and Solicitor);

Respondent, the Minister of Manpower and Immigration (N.M. Thurm, Barrister and Solicitor).

Appellant, a U.S. citizen, entered Canada 15 August 1947 as a landed immigrant. He worked in Toronto until November 1958 at which time he was transferred to Cleveland. He stayed there, holding U.S. immigrant status, until March 1960. At that time he went to Boston, working for General Electric, and later running his own company, where he stayed until December of 1966. On his return to Canada in March of 1967 he spoke to Customs, but not to an Immigration officer. On the 13th of June, 1967 he attempted to enter the United States but was refused entry, whereupon he returned to Canada. At that time an inquiry was held and an order of deportation made. Evidence before the Board showed that the appellant had maintained a house in Toronto while in the United States, as well as a bank account. He had visited Canada often, and stated that he had no intention to settle in the U.S. He had however been married in the United States to a citizen of that country, and had partially completed a course at Harvard. The record also showed that he had been convicted of a Narcotic offence in the United States. For the appellant it was stated: (1) that the appellant had Canadian domicile, pursuant to Section 4, and therefore, had a right to enter Canada, pursuant to Section 3(2); (2) the appellant on 13 June 1968 had never left Canada, and therefore, the Special Inquiry Officer had no jurisdiction under Section 24(1), as the appellant was not entering from the United States; (3) if the appellant had lost Canadian domicile, Sections 27(1) and (2) do not apply.

Held: Abandonment of an acquired domicile to be effective must be complete. There must be an animus reliquendi. On the whole of the evidence in this case, the appellant had acquired a Canadian domicile, and had not abandoned it.

Appeal allowed.-

L'appelant, un citoyen américain, entra au Canada le 15 août 1947 comme immigrant reçu. Il travailla à Toronto jusqu'en novembre 1958 alors qu'il fut transféré à Cleveland. Il y resta, détenant le statut d'immigrant aux Etats-Unis, jusqu'en mars 1960. Il alla alors demeurer à Boston jusqu'en décembre 1966; il travailla pour la Cie General Electric et eut ensuite sa propre compagnie. Lors de son retour au Canada en mars 1967, il s'adressa aux Douanes, mais non pas à un fonctionnaire à l'immigration. Le 13 juin 1967 il essaya d'entrer aux Etats-Unis, mais on lui refusa l'entrée, alors il revint au Canada. Une enquête fut tenue et une ordonnance d'expulsion fut émise contre lui. Les preuves présentées à la Commission démontrent que l'appelant avait maintenu une maison à Toronto, ainsi qu'un compte en banque, alors qu'il était aux Etats-Unis. Il était venu souvent au Canada en visite et il déclara qu'il n'avait nullement l'intention de s'établir aux Etats-Unis. Toutefois, il s'était marié aux Etats-Unis à une citoyenne de ce pays et avait partiellement complété un cours à l'Université Harvard. Le dossier indiquait aussi qu'il avait été trouvé coupable aux Etats-Unis d'une offense au sujet de narcotiques. L'appelant a allégué (1) qu'il avait un domicile canadien, en vertu de l'article 4, et avait par conséquent le droit d'entrer au Canada, en vertu de l'article 3(2) de la Loi sur l'immigration; (2) que le 13 juin 1968, il n'avait jamais quitté le Canada, et par conséquent, l'enquêteur spécial n'avait aucune compétence en vertu de l'article 24 (1) étant donné que l'appelant n'entrait pas au Canada, en provenance des Etats-Unis; (3) s'il avait perdu son domicile canadien les articles 27(1) et (2) ne sont pas applicables.

Arrêt: L'abandon d'un domicile acquis, pour être effectif, doit être total. Il doit y avoir un animus reliquendi. En considérant toute la preuve dans cette affaire on doit conclure que l'appelant avait acquis un domicile canadien et ne l'avait pas abandonné.

Appel accueilli.-

November 21, 1968

le 21 novembre 1968

Deportation order on December 28, 1967 - Appeal filed same day - Inquiry reopened by Department - Additional ground added to order - Notice of appeal. - Appeal completed December 28 - Thus, the Board had whole jurisdiction on res and person of appellant - Amended order and subsequent proceedings a nullity. Original order valid - Immigration Act: S. 5(d); Regulations: S. 23, 28(1), 29(1), 34(3)(e).

Ordonnance d'expulsion le 28 décembre 1967 - Appel mis au dossier le même jour - Réouverture d'enquête par le Ministre - Motif additionnel ajouté à l'ordonnance - Avis d'appel. - Démarches en vue de l'appel complétées le 28 décembre - Dès lors la Commission avait compétence au fond et à la personne de l'appelant - Ordonnance amendée et procédures subséquentes nulles et non avenues - Ordonnance originale valide Loi sur l'immigration: art. 5(d); Règlement: articles 23, 28(1), 29(1), 34(3)(e).

(Weselak, Legaré, Byrne)

Appelant, Hilaire Omer Pille (P. Thompson); intimé, le Ministre de la Main-d'oeuvre et de l'immigration (J. Gilliland).

Pursuant to a Section 23 report on the appellant, an inquiry was held on December 28, 1967, and a deportation order issued. The same day, appeal papers were filed and served. After due notice the Department reopened the inquiry on June 5; an additional ground was added to the order. Notice of appeal was filed and served.

Held: Appeal proceedings were fully completed as of December 28, giving the Board whole jurisdiction over the res and the person of the appellant. Section 29 of the Immigration Act, empowering a Special Inquiry Officer to reopen an Inquiry, is subject to the Immigration Appeal Board Act, a later statute, which divests the Special Inquiry Officer of any jurisdiction in the res once an appeal has been filed and served, and therefore, having been divested of jurisdiction, he had no authority to reopen the Inquiry. Thus, the amended order and proceedings subsequent to December 28 are null and void. The original order is valid.
Appeal dismissed

Suite à un rapport en vertu de l'article 23, une enquête sur l'appelant eut lieu le 28 décembre 1967 et une ordonnance d'expulsion fut émise. Le même jour, des documents d'appel furent déposés et signifiés. Après avis, le Ministre réouvrit l'enquête le 5 juin; un motif additonnel fut ajouté à l'ordonnance. Un avis d'appel fut déposé et signifié.

Arrêt: Les démarches en vue d'appel avaient été complétées le 28 décembre, ce qui, dès lors, donnait compétence à la Commission pour adjuger sur le fond et sur la personne de l'appelant. L'article 29 de la Loi sur l'immigration qui permet à l'enquêteur spécial de réouvrir une enquête, se lit avec la Loi sur la Commission d'appel de l'immigration, une loi postérieure qui retire à l'enquêteur spécial sa compétence au fond, une fois un appel déposé et signifié, ce qui l'empêche donc de réouvrir l'enquête. - Donc, l'ordonnance amendée et les procédures faites après le 28 décembre sont nulles et non avenues. L'ordonnance originale est valide.
Appel rejeté

January 6, 1969

6 janvier 1969

Application for permanent residence - Employment taken without permission - No remuneration - "employment" in ordinary sense contemplates both work and price - Immigration Act S. 5(t); Regulations; S. 34(3)(3); Civil Code: S. 1602 - de la Province de Québec

Demande de résidence permanente - Emploi accepté sans permission - Aucun paiement accepté - "emploi" dans son sens ordinaire comprend travail et prix - Loi sur l'immigration: Art. 5(t); Règlements: Art. 34(3)(e); Code Civil: Art. 1602 - de la Province de Québec.

(Geoffroy, Weselak, Benedetti)

Appellant, Moshed Goldenberg and his wife (M. Berger, Q.C.); Respondent, the Minister of Manpower and Immigration (J. Pépin).

The appellant, a specialist in the treatment of textiles and leather, arrived in Canada, with his wife, October 18, 1967, and the allowed period of stay was extended to December 21, 1967. - During the required period he applied for permanent residence but was refused as he had not obtained prior written authorization from immigration officials for a non-remunerated position he was occupying.

Held:- The word "employment" in S. 34(3)(e) not being defined must be treated as being used in its ordinary sense: it contemplates both work and price. Vide Civil Code, S. 1602. The non-remunerated employment was only taken to prove his skill. Therefore, the appellant was not employed. - Both appeals allowed.

L'appelant, un spécialiste dans le traitement des textiles et du cuir, est entré au Canada avec son épouse le 18 octobre 1967 pour une période qui, après extension se terminait le 21 décembre 1967. Dans les délais permis, il fit une demande de résidence permanente qui lui fut refusée parce qu'il aurait, sans permission écrite et préalable des fonctionnaires à l'immigration, obtenu un emploi non rémunéré.

Arrêt:- Le mot "emploi" dans l'article 34(3)(e) n'étant pas défini doit être considéré et pris dans son sens ordinaire: il comprend travail et prix. Vide Code civil: art. 1602. Il a travaillé sans rémunération seulement pour démontrer ses titres à sa profession. Par conséquent, l'appelant n'a pas été employé.- Les deux appels sont accueillis.

February 6, 1969

-

6 février 1969

Change of name - Whether false information "by reason of which appellant entered or remained in Canada". - Immigration Act: S. 19(1)(e)(viii). - Proof to support ground of deportation - Whether admissible at hearing of appeal.

Changement de nom. - S'agit-il d'un renseignement faux "à la suite duquel l'appelant est entré ou demeuré au Canada". - Loi de l'immigration: Art. 19(1)(e)(viii)- Preuve à l'appui d'un motif d'expulsion - Admissible ou non à l'audition de l'appel.

(Scott, Geoffroy, Legaré)

Appellant, Georgios Seliniotakis (Plakas) - (A.J. Marcovitch, Barrister and Solicitor)
Respondent, the Minister of Manpower and Immigration (A. Nadon, Barrister and Solicitor)

The appellant, a nineteen year old citizen of Greece, unmarried arrived in Canada in June or July 1967 as a member of the crew of a ship. He remained in Montreal, obtained employment, and was arrested on September 26, 1968. An inquiry was held on October 28, 1968, resulting in a deportation order. He testified at the inquiry that where he first arrived he used the name "Georgios Plakas" for a short time.

Held:- The evidence did not support either substantial ground of the deportation order; the appellant had neither entered or remained in Canada by reason of false or misleading information i.e. the use of the name Plakas. Further, there was no proof of the departure of appellant's ship, a vital ingredient of S. 19(1)(e)(x) of the Immigration Act. The Minister cannot introduce evidence at the hearing of the appeal in an endeavour to prove a fact necessary to support a ground of deportation.-

Appeal allowed.-

L'appelant, un citoyen grec célibataire, âgé de 19 ans est arrivé au Canada au cours des mois de juin ou juillet 1967, comme membre de l'équipage d'un navire. Il demeura au Canada, obtint un emploi, et, fut arrêté le 26 septembre 1968. Il y eut une enquête le 28 octobre 1968 et une Ordonnance d'expulsion fut émise. Il déclara à l'enquête que pendant une courte période de temps après son arrivée il utilisa le nom "Georgios Plakas".

Arrêt:- L'un ou l'autre motif majeur dans l'Ordonnance d'expulsion, n'est pas fondé; l'appelant n'est ni entré ni demeuré au Canada "par suite" d'un renseignement faux ou trompeur i.e. l'usage de nom Plakas. De plus, il n'a pas de preuve du départ du navire de l'appelant, un élément essentiel de l'article 19(1)(e)(x) de la Loi de l'immigration. A l'audition de l'appel, le Ministre ne peut présenter une preuve pour tenter d'établir un fait nécessaire pour fonder un motif de l'Ordonnance d'expulsion. Appel accueilli.-

March 12, 1969

-

le 12 mars 1969

Entry as visitor - Change to student status - Repeated border crossings - Employment taken in Canada - Application for permanent residence - Refusal - Rejection at U.S. border - Deportation order - Immigration Act: S. 5(t); Regulations: S. 28(2), 34(3).
 entrée à titre de visiteur - Changement de statut en celui d'étudiante - Frontière franchie maintes fois - Emploi accepté au Canada - Demande de résidence permanente - Refus - Refoulement à la frontière américaine - Ordonnance d'expulsion - Loi sur l'immigration: art. 5(t); Règlement: art. 28(2), 34(3).

(Geoffroy, Houle, Legaré)

appelante, Marie-Thérèse Fouché (Me Berger, C.R.); intimé, Le Ministre de la Main-d'oeuvre et de l'Immigration (Me Babin, avocat).

Held: A person not legally admitted to another country has never left Canada. Thus, prior to April 2nd, the appellant was employed contrary to the Immigration Regulations. The order is valid.

Appellant, a Haitian citizen, was admitted to Canada December 19, 1964. After an extension of her stay, she obtained a change in her status to that of student, till July 1966. She left for the U.S.A. in May 1966, remained as a permanent resident for a month, returned to Canada, took up employment, returned to the U.S.A. in February 1968, returned to her job in Canada soon after, and made application for permanent residence on March 22, 1968. It was refused and she was asked to leave by April 5th. She was rejected at the U.S.A. border and returned to Canada. Appeal dismissed.

Arrêt: Une personne qui n'est pas admise légalement dans un autre pays, n'a jamais quitté le Canada. Donc, avant le 2 avril, l'appelante obtint un emploi à l'encontre des règlements de l'immigration. L'Ordonnance est valide.

L'appelante, une haïtienne, fut admise au Canada le 19 décembre 1964. Après prolongation de son séjour, elle obtint un changement d'état de visiteur à étudiante jusqu'en juillet 1966. Elle alla demeurer en mai 1966 en qualité de résidente permanente aux U.S., revint au Canada, obtint un emploi, retourna au E.U. en février 1968, revint quelques jours après à son emploi, fit une demande de résidence permanente le 22 mars 1968. Ceci lui fut refusé et on l'invita à quitter le pays avant le 5 avril. L'immigration américaine la refoula au Canada.

May 6 1969

-

le 6 mai 1969

Acquisition of Canadian domicile as a child - Return to homeland with mother - Return to Canada later - Deportation order under S. 19(1)(e)(iii). No proof of intention to permanently reside outside Canada - Admissible under S. 4(3)(c) - Immigration Act: 4(3)(c), 19(1)(e)(iii).

Acquisition de domicile canadien par un enfant - Retour à la mère-patrie avec sa mère - Retour au Canada plus tard - Ordonnance d'expulsion en vertu de l'article 19(1)(e)(iii). - Aucune preuve de l'intention de résider en permanence hors du Canada - Admissible en vertu de l'article 4(3)(c) - Loi sur l'immigration: art. 4(3)(c), 19(1)(e)(iii).

(Campbell, Glogowski, Benedetti)

Appellant, Catherina Wilhelmina Louisa Wittkamper (I. Waddell, Barrister and Solicitor);

Respondent, the Minister of Manpower and Immigration (G. Labelle).

Appellant, a twenty-one years old citizen of the Netherlands, acquired Canadian domicile in 1952. She returned as a minor to her homeland in 1962 with her mother, only to return to Canada in 1967 as a landed immigrant. She was ordered deported under S. 19(1)(e)(iii) after a 1968 conviction.

Held: The appellant is a person falling within section 4(3)(c) of the Immigration Act. The evidence does not disclose that the appellant resided outside Canada with the intention of making her permanent home out of Canada. As a minor she was incapable of forming the intent necessary to voluntarily reside out of Canada.

Appeal allowed.

L'appelante, une citoyenne de Hollande, âgée de vingt et un ans, acquit un domicile canadien en 1952. Mineure, elle retourna dans sa mère-patrie en 1962 avec sa mère mais revint au Canada en 1967 à titre d'immigrant. Suite à une condamnation en 1968, une ordonnance d'expulsion a été émise contre elle en vertu de l'article 19(1)(e)(iii).

Arrêt: L'appelante se classe parmi les personnes mentionnées à l'article 4(3)(c) de la Loi sur l'immigration. Il n'y a aucune preuve qu'elle a voulu résider hors du Canada en permanence. Une mineure ne pouvait former l'intention requise pour résider hors du Canada.

Appel accueilli.

May 16, 1969

-

1e 16 mai 1969

Special Inquiry Officer - Power to include grounds in deportation order, not set out in a S. 23 report. - Statement that "Counsel" may include non-lawyers. - Whether denial of natural justice. - Immigration Act: S. 23; 28.-

Enquêteur spécial - Pouvoir d'inclure dans une ordonnance d'expulsion des motifs non inclus dans un rapport en vertu de l'article 23. - Déclaration que "conseiller" peut s'entendre de personnes qui ne sont pas avocats. - Y a-t-il déni de justice? - Loi de l'immigration: Art. 23; 28.-

(Weselak, Houle, Byrne)

Appellant, Marlyn Wayne Morley.(M.E. Berger, Q.C.); respondent, The Minister of Manpower and Immigration (G.Labelle, Department of Manpower and Immigration)

The appellant entered Canada from the United States and applied for permanent residence. He failed on his assessment and was ordered to leave the country, but did not so. The Section 23 report was made, naming Section 5(t) of the Immigration Act, and Sections 34(3)(f), 28(2) and 29(1) of the Immigration Regulations. An inquiry was convened, and a further ground of deportation base on Section 34(3)(b) of the Regulations was added.

Held:- The Board finds that the wording of Section 28 does not restrict the findings of the Special Inquiry Officer to the grounds set out in the Section 23 Report, but extends the power of the Special Inquiry Officer to include other grounds proven by evidence. - A statement by a Special Inquiry Officer that the person concerned is entitled to legal counsel, but that the word "counsel" also includes persons who were not lawyers, is in accordance with the demands of natural justice. So long as the person is told of his right to counsel, any additional information is surplusage.

Appeal dismissed.-

L'appelant est entré au Canada, venant des Etats-Unis et fit une demande de résidence permanente. Il faillit aux normes d'appréciations et une ordonnance d'expulsion fut émise, mais l'appelant refusa d'obtempérer. Un rapport selon l'article 23 fut rédigé et appuyé sur l'article 5(t) de la Loi d'immigration et sur les articles 34(3)(f) 28(2) et 29(1) du Règlement de l'immigration. Une enquête a été tenue et un motif additionnel d'expulsion, appuyé sur l'article 34(3)(b) du Règlement, fut ajouté.

Arrêt:- La Commission est d'avis que le texte de l'article 28 n'est pas limitatif du pouvoir de l'enquêteur spécial d'inclure des motifs d'expulsion - pourvu qu'ils soient en preuve - en sus de ceux contenus dans le rapport selon l'article 23. Une déclaration par l'enquêteur spécial que le sujet de l'enquête a droit à un conseil juridique mais que le mot "conseil" s'entend aussi de personnes qui ne sont pas des avocats, satisfait aux exigences de la justice naturelle. Pourvu que le sujet soit informé de son droit à ministère de conseiller, tous autres renseignements sont superfétatoires.

Appel rejeté.-

June 2, 1969

-

2 juin 1969

Assessment - Intended occupation not shown on application - Assessment manifestly wrong - Immigration Regulations: S.34(3)(f). - Schedule A.-

Appréciation - Emploi désiré n'apparaît pas au formulaire de demande. - Appréciation manifestement erronée. - Règlement de l'immigration: Art. 34(3)(f). - Annexe A.

Weselak, Scott, Legaré)

Appellant, John Douce (J. Rafael); Respondent, the Minister of Manpower and Immigration (F.D. Craddock)

The appellant arrived in Canada April 26, 1968, and the allowed period of stay was extended to June 20, 1968. - On June 5, 1968, the appellant made application for permanent residence, but received only 30 units on his assessment, the application being refused. The appellant had not filled in the space provided for intended occupation on his application. The appellant was said to be a painter, but no other details were given.

Held:- No valid assessment could be made pursuant to S. 1(c), 1(d) and 1(i) of Schedule A to the Immigration Regulations without the necessary information. From a lack of information, the assessing officer had made a manifestly wrong conclusion.-
Appeal allowed.

L'appelant est entré au Canada le 26 avril 1968 et la période de séjour autorisée fut prolongée jusqu'au 20 juin 1968. Le 5 juin 1968, l'appelant fit une demande de résidence permanente mais n'ayant reçu que 30 points d'appréciation sa demande fut refusée. Dans l'espace prévue à cette fin dans le formulaire de demande, l'appelant n'a pas indiqué l'emploi désiré. - Supposément l'appelant est un peintre, mais aucun détail est fourni.-

Arrêt:- Sans l'information nécessaire, on ne peut procéder à une appréciation juste et conforme à l'article 1(c), 1(d) et 1(i) de l'annexe A au Règlement. Par suite d'un manque d'information, le fonctionnaire à l'immigration en est arrivé à une conclusion manifestement erronée.-
Appel accueilli.-

IMMIGRATION APPEAL BOARD ACT

**LOI SUR LA COMMISSION D'APPEL
DE L'IMMIGRATION**

Immigration Appeal Board Rules

**Règles de la Commission d'appel
de l'immigration**

14-15-16 ELIZABETH II.

CHAP. 90

An Act to make provision for appeals to an Immigration Appeal Board in respect of certain matters relating to immigration.

[Assented to 23rd March, 1967.]

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

SHORT TITLE.

1. This Act may be cited as the *Immigration Appeal Board Act*. Short title.

INTERPRETATION.

- 2.** In this Act,
- | | | |
|-----|--|-------------------------|
| (a) | "Board" means the Immigration Appeal Board established by this Act; | Definitions "Board." |
| (b) | "Canadian citizen" means a person who is a Canadian citizen within the meaning of the <i>Canadian Citizenship Act</i> ; | "Canadian citizen." |
| (c) | "Chairman" means the Chairman of the Board; | "Chairman." |
| (d) | "hearing" means a further examination or inquiry conducted by a Special Inquiry Officer under the <i>Immigration Act</i> ; | "Hearing." |
| (e) | "member" means a member of the Board; | "Member." |
| (f) | "Minister" means the Minister of Manpower and Immigration; | "Minister." |
| (g) | "permanent resident" means a person who has been granted lawful admission to Canada for permanent residence under the <i>Immigration Act</i> ; | "Permanent resident." |
| (h) | "Vice-Chairman" means the Vice-Chairman of the Board; and | "Vice-Chairman." |

Other words
and
expressions.

(i) other words and expressions in this Act have the same meaning as in the *Immigration Act*.

IMMIGRATION APPEAL BOARD ESTABLISHED.

Board
established.

3. (1) There shall be a board, to be called the Immigration Appeal Board consisting of not less than seven nor more than nine members to be appointed by the Governor in Council.

Tenure of
members.

(2) Subject to subsection (3), each member shall be appointed to hold office during good behaviour but may be removed by the Governor in Council for cause.

Retirement
age.

(3) A member ceases to hold office upon attaining the age of seventy years.

Age limit
for
appointment.

(4) No person who has attained the age of sixty-five years shall be appointed a member.

Chairman
and
Vice-Chairman.

(5) The Governor in Council shall designate one of the members to be Chairman of the Board and two of the members to be Vice-Chairmen of the Board.

Absence or
incapacity.

(6) In the event of the absence or incapacity of the Chairman, a Vice-Chairman or any other member or if the office of such person is vacant, the Minister may appoint some other person qualified to hold such office to act in his stead during his absence or incapacity or until the vacancy is filled, as the case may be, but where the Chairman is absent or unable to act or his office is vacant and no person has been so appointed to act in his stead, a Vice-Chairman designated by the Minister, has and may exercise and perform all of the duties and powers of the Chairman.

Qualifica-
tions of
members

(7) The Chairman and at least two other members shall be barristers or advocates of at least ten years' standing at the bar of a province.

Remunera-
tion and
expenses

4. Each member shall be paid such remuneration for his services as is fixed by the Governor in Council, and is entitled to be paid reasonable travelling and living expenses incurred by him while absent from his ordinary place of residence in the course of his duties under this Act.

Chairman
chief
executive
officer.

5. The Chairman is the chief executive officer of the Board and has supervision over and direction of the work and the staff of the Board.

Head office.

6. (1) The head office of the Board shall be at the City of Ottawa and the Chairman and other members shall live there or within fifteen miles thereof or at such other places as may be designated by the Governor in Council.

Sittings.

(2) The Board may sit at such places in Canada as it sees fit.

(3) The Chairman and not less than two other members, or one of the Vice-Chairmen and not less than two other members if at least one of such persons is a person described in subsection (7) of section 3, constitute a quorum of the Board.

Quorum.

7. (1) The Board is a court of record and shall have an official seal, which shall be judicially noticed.

Court of record.

(2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may

Power of Board to examine witnesses, etc.

- (a) issue a summons to any person requiring him to appear at the time and place mentioned therein to testify to all matters within his knowledge relative to a subject matter before the Board and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to such subject matter;
- (b) administer oaths and examine any person upon oath, affirmation or otherwise; and
- (c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it.

(3) The Board may, and at the request of either of the parties to the appeal shall give reasons for its disposition of the appeal.

Reasons.

8. (1) The Board may, subject to the approval of the Governor in Council, make rules not inconsistent with this Act governing the activities of the Board and the practice and procedure in relation to appeals to the Board under this Act.

Board may make rules.

(2) No rule made pursuant to subsection (1) has effect until it has been published in the *Canada Gazette*.

Publication.

9. (1) Such officers, clerks and employees as are necessary for the proper conduct of the work of the Board shall be appointed in accordance with the *Public Service Employment Act*.

Appointment of officers, clerks, etc.

(2) For the purposes of the *Public Service Superannuation Act* the members appointed under subsection (1) of section 3 and the officers, clerks and employees appointed as provided in subsection (1) of this section shall be deemed to be employed in the Public Service.

Application of P.S.S. Act.

HEARING AND DETERMINATION OF APPEALS.

Hearing of
appeal and
taking of
evidence.

10. (1) The Chairman of the Board may direct that evidence relating to an appeal under this Act be received, in whole or in part, by a member of the Board and that member has and may exercise all of the powers of the Board in relation to the hearing of the appeal.

Report to
Board.

(2) A member by whom evidence relating to an appeal under this Act has been received pursuant to subsection (1) shall make a report thereon to the Board and a copy of the report shall be provided to each of the parties to the appeal.

Determi-
nation of
appeal.

(3) After receiving any report made under subsection (2), and after holding a rehearing, in whole or in part, of the appeal if in its discretion the Board deems it advisable to do so, the Board shall determine the appeal.

APPEALS FROM ORDERS OF DEPORTATION.

Appeal on
question of
law or fact.

11. A person against whom an order of deportation has been made under the provisions of the *Immigration Act* may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact.

Appeal by
Minister.

12. The Minister may appeal to the Board on any ground of appeal that involves a question of law or fact, or mixed law and fact, from a decision by a Special Inquiry Officer that a person in respect of whom a hearing has been held is not within a prohibited class or is not subject to deportation.

Reopening of
hearing and
additional
evidence.

13. The Board may order a hearing reopened before the Special Inquiry Officer who presided at the hearing or before some other Special Inquiry Officer for the receiving of any additional evidence or testimony, and the Special Inquiry Officer who presides at the reopened hearing shall file a copy of the minutes of the reopened hearing, together with his assessment of such additional evidence or testimony, with the Board for its consideration in disposing of the appeal.

Disposition
of appeal.

14. The Board may dispose of an appeal under section 11 or section 12 by

- (a) allowing it;
- (b) dismissing it; or
- (c) rendering the decision and making the order that the Special Inquiry Officer who presided at the hearing should have rendered and made.

15. (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that

Execution
of order.

- (a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case, or
- (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made.

(2) Where, pursuant to subsection (1), the Board directs that execution of an order of deportation be stayed, it shall allow the person concerned to come into or remain in Canada under such terms and conditions as it may prescribe and shall review the case from time to time as it considers necessary or advisable.

Terms of
stay of
execution.

- (3) The Board may at any time
- (a) amend the terms and conditions prescribed under subsection (2) or impose new terms and conditions; or
- (b) cancel its direction staying the execution of an order of deportation and direct that the order be executed as soon as practicable.

Board may
amend terms
or cancel
direction.

tion

- (4) Where the execution of an order of deportation
- (a) has been stayed pursuant to paragraph (a) of subsection (1), the Board may at any time thereafter quash the order; or
- (b) has been stayed pursuant to paragraph (b) of subsection (1), the Board may at any time thereafter quash the order and direct the grant of entry or landing to the person against whom the order was made.

Quashing of
deportation
order, etc.

Return to
Canada for
hearing of
appeal.

16. Where a person who has been ordered deported and who has been returned to the place whence he came to Canada in accordance with the requirements of subsection (1) of section 24 of the *Immigration Act*, advises the Board in writing of his desire to appear in person before the Board on the hearing of his appeal against the order of deportation, the Board may allow such person to return to Canada for that purpose under such terms and conditions as it may prescribe.

APPEALS BY SPONSORS.

Appeal from
refusal to
approve
application.

17. A person who has made application for the admission into Canada of a relative pursuant to regulations made under the *Immigration Act* may appeal to the Board from a refusal to approve the application, and if the Board decides that the person whose admission is being sponsored and the sponsor of that person meet all the requirements of the *Immigration Act* and the regulations made thereunder relevant to the approval of the application or that there exist compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief, the application shall be approved, but an appeal under this section may be taken only by such persons and in respect of such classes of relatives referred to in the regulations as may be defined by order of the Governor in Council.

RELEASE PENDING HEARING.

Order of
release.

18. (1) A person who is being detained pending the hearing and disposition of an appeal under this Act may apply to the Board for his release and the Board may, notwithstanding anything in the *Immigration Act*, order his release.

Recognizance

(2) A person may be released under subsection (1) upon entering into

- (a) a recognizance before the Board, or a member thereof, in such form and with sufficient sureties in such amount as the Board directs;
- (b) his own recognizance before the Board, or a member thereof, and depositing with the Board such sum of money as the Board directs; or
- (c) his own recognizance before the Board, or a member thereof, in such amount as the Board directs without any deposit;

and the recognizance shall prescribe such conditions of release as the Board deems advisable, including the time and place at which the person released shall report to an immigration officer.

- (3) The Board may at any time,
 (a) cancel an order of release and direct that the person concerned be returned to custody;
 (b) vary the amount of a recognizance or deposit; or
 (c) vary the conditions of any release ordered by it.
- (4) Where a person released under subsection (1) fails to comply with any of the conditions under which he was released, the Board, or a member thereof, may make an order for his arrest and detention and the Board may order the forfeiture of the amount of the recognizance or deposit given or made by him.
- (5) Where the Board orders any forfeiture under subsection (4), the principal and his sureties become debtors of the Crown, each in the amount he has pledged himself to pay and the debt is, subject to subsection (6), recoverable in the Exchequer Court of Canada as a debt due to the Crown.
- (6) Where a deposit has been made by a person against whom an order of forfeiture has been made under subsection (4), the amount of the deposit shall be delivered to the Receiver General of Canada.
- (7) An order for arrest and detention made under this section is, notwithstanding any other Act or law, sufficient authority for the person to whom it is addressed to arrest and detain the person concerned, and any such order may be addressed generally to peace officers or immigration officers or both.

Cancellation of order, etc.

Failure to comply with order.

Debt due to Crown.

Delivery over of deposit.

Authority to arrest and detain.

NOTICE AND HEARING.

- 19.** (1) An appellant who proposes to appeal to the Board shall give notice of the appeal in such manner and within such time as is prescribed by the rules of the Board.
- (2) Every appellant under section 11 or 17 shall be advised by the Minister of the grounds on which the deportation order was made or the refusal to approve the application for admission into Canada was based.
- 20.** An appeal to the Board shall be heard in public but if the appellant so requests the Board may in its discretion direct that it be heard *in camera*.

Notice of appeal.

Grounds of order or refusal.

Hearing of appeal.

SECURITY.

- 21.** (1) Notwithstanding anything in this Act, the Board shall not,
 (a) in the exercise of its discretion under section 15, stay the execution of a deportation order or

Certificate of Minister and Solicitor General.

thereafter continue or renew the stay, quash a deportation order, or direct the grant of entry or landing to any person, or

- (b) render a decision pursuant to section 17 that a person whose admission is being sponsored and the sponsor of that person meet the requirements referred to in that section,

if a certificate signed by the Minister and the Solicitor General is filed with the Board stating that in their opinion, based upon security or criminal intelligence reports received and considered by them, it would be contrary to the national interest for the Board to take such action.

Evidence.

(2) A certificate purporting to be signed by the Minister and the Solicitor General pursuant to subsection (1) shall be deemed to have been signed by them and shall be received by the Board without proof of the signatures or official character of the persons appearing to have signed the same unless called into question by the Minister or the Solicitor General, and the certificate is conclusive proof of the matters stated therein.

EXCLUSIVE JURISDICTION OF BOARD AND APPEALS TO SUPREME COURT.

Jurisdiction
of Board.

22. Subject to this Act and except as provided in the *Immigration Act*, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for the admission to Canada of a relative pursuant to regulations made under the *Immigration Act*.

Appeal to
Supreme
Court of
Canada.

23. (1) An appeal lies to the Supreme Court of Canada on any question of law, including a question of jurisdiction, from a decision of the Board on an appeal under this Act if leave to appeal is granted by that Court within fifteen days after the decision appealed from is pronounced or within such extended time as a judge of that Court may, for special reasons, allow.

Rules
governing
appeals to
Supreme
Court of
Canada.

(2) The Governor in Council may make rules governing the practice and procedure in relation to applications for leave to appeal and appeals to the Supreme Court of Canada pursuant to this section, and such rules shall be binding notwithstanding any rule or practice that would otherwise be applicable.

(3) No order as to costs shall be made in respect of an application for leave to appeal or an appeal to the Supreme Court of Canada pursuant to this section. Costs.

CONSEQUENTIAL AMENDMENTS.

24. Paragraph (k) of section 2 of the *Immigration Act* is repealed. R.S., c. 325.

25. Subsection (5) of section 7 of the said Act is repealed and the following substituted therefor:

“(5) The Minister may make a deportation order against a person referred to in subsection (4).” Minister may order deportation.

26. (1) Subsections (1) and (2) of section 8 of the said Act are repealed and the following substituted therefor:

“**8.** (1) The Minister may issue a written permit authorizing any person to enter Canada or, being in Canada, to remain therein, other than Issue of permits.

(a) a person under order of deportation who was not issued such a written permit before the coming into force of this subsection, or

(b) a person in respect of whom an appeal under section 17 of the *Immigration Appeal Board Act* has been taken that has not been successful.

(2) A permit shall be expressed to be in force for a specified period not exceeding twelve months.” Period of permit.

(2) Subsection (4) of section 8 of the said Act is repealed and the following substituted therefor:

“(4) The Minister may, upon the cancellation or expiration of a permit, make a deportation order respecting the person concerned.” Deportation following termination of permit.

27. Section 12 of the said Act is repealed.

28. Section 29 of the said Act is repealed and the following substituted therefor:

“**29.** An inquiry may be reopened by a Special Inquiry Officer for the hearing and receiving of any additional evidence or testimony and a Special Inquiry Officer has authority, after hearing such additional evidence or testimony, to confirm, amend or reverse the decision previously rendered.” Reopening of inquiry.

29. Sections 30 and 31 of the said Act are repealed.

30. Section 39 of the said Act is repealed.

31. Section 62 of the said Act is repealed and the following substituted therefor:

Regulations
respecting
procedure,
duties, etc.

“**62.** The Minister may make regulations, not inconsistent with this Act, respecting the procedure to be followed upon examinations and inquiries under this Act and the duties and obligations of immigration officers and the methods and procedure for carrying out such duties and obligations whether in Canada or elsewhere.”

32. Subsection (1) of section 64 of the said Act is repealed and the following substituted therefor:

Proof of
documents.

“**64.** (1) Every document purporting to be a deportation order, rejection order, warrant, order, summons, direction, notice or other document over the name in writing of the Minister, Director, Special Inquiry Officer, immigration officer or other person authorized under this Act to make such document is, in any prosecution or other proceeding under or arising out of this Act or the *Immigration Appeal Board Act*, admissible in evidence as *prima facie* proof of the facts contained therein, without proof of the signature or the official character of the person appearing to have signed the same, unless called in question by the Minister or some other person acting for him or Her Majesty.”

TRANSITIONAL.

- 33.** This Act applies in respect of
- (a) any order of deportation made after the coming into force of this Act, and any order of deportation made before the coming into force of this Act that has not been executed, where no appeal therefrom has been taken under section 31 of the *Immigration Act*;
and
 - (b) a refusal to approve an application for the admission of a relative, submitted after the making of any order by the Governor in Council pursuant to section 17 of this Act.

COMMENCEMENT.

34. This Act shall come into force on a day to be Coming into
force.
fixed by proclamation of the Governor in Council.

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

14-15-16 ÉLISABETH II.

CHAP. 90

Loi prévoyant des appels devant une commission d'appel de l'immigration au sujet de certaines questions relatives à l'immigration.

[Sanctionnée le 23 mars 1967.]

SA Majesté, sur l'avis et du consentement du Sénat et de la Chambre des communes du Canada, décrète:

TITRE ABRÉGÉ.

1. La présente loi peut être citée sous le titre: *Loi sur la Commission d'appel de l'immigration.* Titre abrégé.

INTERPRÉTATION.

- 2.** Dans la présente loi, l'expression
- | | |
|--|----------------------|
| a) «Commission» désigne la Commission d'appel de l'immigration, établie par la présente loi; | «Commission» |
| b) «citoyen canadien» désigne une personne qui est citoyen canadien au sens de la <i>Loi sur la citoyenneté canadienne</i> ; | «citoyen canadien» |
| c) «président» désigne le président de la Commission; | «président» |
| d) «audition» signifie l'examen ou l'enquête supplémentaire qu'un enquêteur spécial fait en vertu de la <i>Loi sur l'immigration</i> ; | «audition» |
| e) «membre» désigne un membre de la Commission; | «membre» |
| f) «Ministre» désigne le ministre de la Main-d'œuvre et de l'Immigration; | «Ministre» |
| g) «résident permanent» désigne une personne à qui a été accordée l'admission légale au Canada aux fins de la résidence permanente en vertu de la <i>Loi sur l'immigration</i> ; | «résident permanent» |
| h) «vice-président» désigne le vice-président de la Commission; et | «vice-président» |

Autres mots
et expressions.

i) les autres mots et expressions de la présente loi ont le même sens que dans la *Loi sur l'immigration*.

CRÉATION DE LA COMMISSION D'APPEL DE L'IMMIGRATION.

Établis-
sement de la
Commission

3. (1) Est établie une commission appelée Commission d'appel de l'immigration, formée d'au moins sept membres et d'au plus neuf membres que nomme le gouverneur en conseil.

Durée du
mandat des
membres.

(2) Sous réserve du paragraphe (3), chaque membre est nommé pour occuper son poste durant bonne conduite, mais il peut être démis de sa charge pour cause par le gouverneur en conseil.

Âge de la
retraite

(3) Un membre cesse d'occuper son poste lorsqu'il atteint l'âge de soixante-dix ans.

Âge limite
à la
nomination.

(4) Quiconque a atteint l'âge de soixante-cinq ans ne peut être nommé membre.

Président et
vice-
président.

(5) Le gouverneur en conseil désigne un des membres pour occuper le poste de président de la Commission et deux des membres pour occuper les postes de vice-président de la Commission.

Absence ou
incapacité.

(6) En cas d'absence ou d'incapacité du président, d'un vice-président ou de tout autre membre ou si le poste de cette personne est vacant, le Ministre peut nommer une autre personne apte à occuper le poste pour agir à sa place pendant son absence ou son incapacité ou jusqu'à ce que le poste soit pourvu, selon le cas, mais lorsque le président est absent ou incapable d'agir ou lorsque son poste est vacant et que personne n'a ainsi été nommé pour agir à sa place, un vice-président désigné par le Ministre, possède et peut exercer toutes les fonctions et tous les pouvoirs du président.

Conditions à
remplir par
les membres.

(7) Le président et au moins deux autres membres doivent être avocats inscrits depuis dix ans au barreau d'une province.

Rémunéra-
tion et
dépenses.

4. Chaque membre reçoit pour ses services la rémunération que fixe le gouverneur en conseil et a droit aux frais raisonnables de voyage et de subsistance qu'il subit, dans l'exercice des fonctions que lui attribue la présente loi, alors qu'il est absent de son lieu ordinaire de résidence.

Le président
est le fonc-
tionnaire
administratif
en chef.

5. Le président est le fonctionnaire administratif en chef de la Commission; il en surveille les travaux et en dirige le personnel.

6. (1) Le siège social de la Commission est établi en la cité d'Ottawa et le président et les autres membres doivent y demeurer ou habiter dans un rayon de quinze milles de cette ville ou tels autres lieux que peut désigner le gouverneur en conseil. Siège social.

(2) La Commission peut siéger aux endroits au Canada où elle juge opportun de le faire. Séances.

(3) Le président et au moins deux autres membres, ou l'un des vice-présidents et au moins deux autres membres si au moins une de ces personnes est mentionnée au paragraphe (7) de l'article 3, constituent un quorum de la Commission. Quorum.

7. (1) La Commission est une cour d'archives et doit avoir un sceau officiel dont il est judiciairement pris connaissance. Cour d'archives.

(2) La Commission a, en ce qui concerne la présence, la prestation de serment et l'interrogatoire des témoins, la production et l'examen des documents, l'exécution de ses ordonnances et autres questions nécessaires ou appropriées à l'exercice régulier de sa compétence, tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archives et, sans limiter la généralité de ce qui précède, peut Pouvoir de la Commission d'interroger des témoins, etc.

- a) adresser à toute personne une citation lui enjoignant de comparaître aux temps et lieu y mentionnés pour témoigner sur toutes questions de sa connaissance relativement à l'affaire dont est saisie la Commission et d'apporter et produire tout document, livre ou écrit y relatif qu'elle a en sa possession ou sous son contrôle;
- b) faire prêter serment et interroger toute personne sous serment, affirmation ou autrement; et
- c) au cours d'une audition, recevoir les renseignements supplémentaires qu'elle peut estimer être de bonne source ou dignes de foi et nécessaires pour juger l'affaire dont elle est saisie.

(3) La Commission peut et doit, à la demande de l'une ou l'autre des parties à l'appel, motiver sa décision quant à l'appel. Motifs.

8. (1) La Commission peut, sous réserve de l'approbation du gouverneur en conseil, établir des règles non incompatibles avec la présente loi en ce qui concerne son activité et la pratique et la procédure relatives aux appels à la Commission prévus par la présente loi. La Commission peut établir des règles.

(2) Aucune règle établie en conformité du paragraphe (1) n'a d'effet avant d'être publiée dans la *Gazette du Canada*. Publication

Nomination
des
fonction-
naires,
commis, etc.

9. (1) Les fonctionnaires, commis et employés nécessaires à la bonne marche des travaux de la Commission sont nommés conformément à la *Loi sur l'emploi dans la Fonction publique*.

Application
de la *Loi sur
la pension du
service public*.

(2) Aux fins de la *Loi sur la pension du service public*, les membres nommés en vertu du paragraphe (1) de l'article 3 et les fonctionnaires, commis et employés nommés comme il est prévu au paragraphe (1) du présent article sont réputés employés dans la Fonction publique.

AUDITION ET JUGEMENT DES APPELS.

Audition de
l'appel et
réception de
la preuve.

10. (1) Le président de la Commission peut ordonner que la preuve relative à un appel prévu par la présente loi soit reçue en totalité ou en partie par un membre de la Commission, et ce membre possède et peut exercer tous les pouvoirs de la Commission relativement à l'audition de l'appel.

Rapport à la
Commission.

(2) Un membre par qui la preuve relative à un appel prévu par la présente loi a été reçue en conformité du paragraphe (1) doit présenter à ce sujet un rapport à la Commission et un exemplaire dudit rapport doit être fourni à chacune des parties à l'appel.

Décision
quant à
l'appel

(3) Après avoir reçu un rapport présenté en vertu du paragraphe (2) et avoir tenu une nouvelle audition totale ou partielle de l'appel, la Commission doit, si elle juge à sa discrétion opportun de le faire, décider de l'appel.

APPELS DES ORDONNANCES D'EXPULSION.

Appel d'une
question de
droit ou de
fait.

11. Une personne contre qui a été rendue une ordonnance d'expulsion, aux termes des dispositions de la *Loi sur l'immigration*, peut, en se fondant sur un motif d'appel qui implique une question de droit ou une question de fait ou une question mixte de droit et de fait, interjeter appel à la Commission.

Appel par
le Ministre.

12. Le Ministre, en se fondant sur un motif d'appel qui implique une question de droit ou de fait ou une question mixte de droit et de fait, peut interjeter appel à la Commission d'une décision d'un enquêteur spécial portant qu'une personne à l'égard de qui a été tenue une audition n'est pas dans une catégorie interdite ou n'est pas sujette à l'expulsion.

Reprise de
l'audition et
preuve supplé-
mentaire.

13. La Commission peut ordonner qu'une audition soit reprise devant l'enquêteur spécial qui a présidé l'audition ou devant tout autre enquêteur spécial pour recueillir quelque déposition ou témoignage supplémentaires, et l'enquêteur spécial qui préside la reprise de l'audition doit

produire une copie du compte rendu de la reprise de l'audition ainsi que son appréciation de cette déposition ou de ce témoignage à la Commission pour qu'elle l'examine en statuant sur l'appel.

14. La Commission peut statuer sur un appel prévu à l'article 11 ou à l'article 12, Décision d'appel.

- a) en admettant l'appel;
- b) en rejetant l'appel; ou
- c) en prononçant la décision et en rendant l'ordonnance que l'enquêteur spécial qui a présidé l'audition aurait dû prononcer et rendre.

15. (1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que Exécution de l'ordonnance.

- a) dans le cas d'une personne qui était un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu de toutes les circonstances du cas, ou
- b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
 - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
 - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.

(2) Lorsque, en conformité du paragraphe (1), la Commission ordonne de surseoir à l'exécution d'une ordonnance d'expulsion, elle doit permettre à la personne intéressée de venir ou de demeurer au Canada aux conditions qu'elle peut prescrire et doit examiner de nouveau l'affaire, à l'occasion, selon qu'elle l'estime nécessaire ou opportun. Modalités du sursis à l'exécution.

La Commission peut modifier les modalités de sa décision ou l'annuler.

Annulation d'une ordonnance d'expulsion.

- (3) La Commission peut, en tout temps,
- a) modifier les conditions prescrites aux termes du paragraphe (2) ou imposer de nouvelles conditions; ou
 - b) annuler sa décision de surseoir à l'exécution d'une ordonnance d'expulsion et ordonner que l'ordonnance soit exécutée aussitôt que possible.
- (4) Lorsqu'il a été sursis à l'exécution d'une ordonnance d'expulsion
- a) en conformité de l'alinéa a) du paragraphe (1), la Commission peut, en tout temps par la suite, annuler l'ordonnance; ou
 - b) en conformité de l'alinéa b) du paragraphe (1), la Commission peut, en tout temps par la suite, annuler l'ordonnance et décréter que le droit d'entrée ou de débarquement soit accordé à la personne contre qui l'ordonnance a été rendue.

Retour au Canada pour audition de l'appel.

16. Lorsqu'une personne, dont l'expulsion a été ordonnée et qui a été renvoyée au lieu d'où elle est venue au Canada comme l'exige le paragraphe (1) de l'article 24 de la *Loi sur l'immigration*, avise la Commission par écrit de son désir de comparaître en personne devant la Commission lors de l'audition de son appel de l'ordonnance d'expulsion, la Commission peut autoriser cette personne à revenir au Canada, à cette fin, aux conditions qu'elle peut prescrire.

APPELS INTERJETÉS PAR LES RÉPONDANTS.

Appel du refus d'approuver une demande.

17. Une personne qui a demandé l'admission au Canada d'un parent en conformité des règlements établis selon la *Loi sur l'immigration* peut interjeter appel à la Commission du refus d'approbation de la demande et, si la Commission juge que la personne dont l'admission a été parrainée et que le répondant de cette personne satisfont à toutes les exigences de la *Loi sur l'immigration* et des règlements établis sous son régime concernant l'approbation de la demande ou qu'il existe des motifs de pitié ou des considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial, la demande doit être approuvée; mais un appel aux termes du présent article ne peut être interjeté que par les personnes et qu'à l'égard des catégories de parents dont font mention les règlements, que le gouverneur en conseil peut définir par décret.

MISE EN LIBERTÉ EN ATTENDANT LA
FIN DE L'AUDITION.

18. (1) Une personne détenue en attendant que l'appel prévu par la présente loi soit entendu et décidé peut demander à la Commission d'être mise en liberté et la Commission peut, nonobstant toute disposition de la *Loi sur l'immigration*, ordonner sa mise en liberté.

Ordonnance
de mise en
liberté.

(2) Une personne peut être mise en liberté aux termes du paragraphe (1) en souscrivant

Caution.

- a) une caution devant la Commission ou un de ses membres, selon la forme que prescrit la Commission, accompagnée de garanties suffisantes dont la Commission fixe le montant;
- b) une caution personnelle devant la Commission ou un de ses membres, et en déposant auprès de la Commission la somme d'argent que celle-ci fixe; ou
- c) une caution personnelle devant la Commission ou un de ses membres, dont la Commission fixe le montant sans exiger de dépôt;

et la Commission doit prescrire, au sujet de la mise en liberté, les conditions que la Commission estime opportunes, notamment la date et l'endroit où la personne mise en liberté doit se présenter à un fonctionnaire de l'immigration.

(3) La Commission peut, en tout temps,

Annulation
de
l'ordonnance,
etc.

- a) annuler une ordonnance de mise en liberté et ordonner que la personne en cause soit de nouveau détenue;
- b) modifier le montant de la caution ou du dépôt; ou
- c) modifier les conditions de toute mise en liberté ordonnée par elle.

(4) Lorsqu'une personne mise en liberté aux termes du paragraphe (1) ne se conforme pas à l'une quelconque des conditions auxquelles elle a été mise en liberté, la Commission ou un de ses membres peut rendre une ordonnance d'arrestation et de détention et la Commission peut ordonner la confiscation du montant de la caution donnée ou du dépôt effectué par cette personne.

Fait de ne
pas se
conformer à
l'ordonnance.

(5) Lorsque la Commission ordonne une confiscation aux termes du paragraphe (4), le débiteur principal et ses garants deviennent des débiteurs de la Couronne, chacun du montant qu'il s'est engagé de payer, et la dette est, sous réserve du paragraphe (6), recouvrable en Cour de l'Échiquier du Canada comme une dette due à la Couronne.

Dette due à
la Couronne.

(6) Lorsqu'un dépôt a été fait par une personne contre qui une ordonnance de confiscation a été rendue aux

Remise du
dépôt.

termes du paragraphe (4), le montant du dépôt doit être remis au receveur général du Canada.

Autorité
pour arrêter
et détenir.

(7) Une ordonnance en vue de l'arrestation et de la détention, rendue aux termes du présent article, confère, nonobstant tout autre statut ou loi, à la personne à qui elle est adressée l'autorité suffisante d'arrêter et de détenir la personne en cause, et une telle ordonnance peut être adressée en général aux agents de la paix ou aux fonctionnaires de l'immigration ou, à la fois, aux uns et aux autres.

AVIS ET AUDITION.

Avis
d'appel.

19. (1) Tout appelant qui se propose d'interjeter appel auprès de la Commission doit donner avis de cet appel, de la manière et dans le délai prescrits par les règles de la Commission.

Motifs de
l'ordonnance
ou du refus.

(2) Chaque appelant en vertu de l'article 11 ou de l'article 17 doit être avisé par le Ministre des motifs sur lesquels se fonde l'ordonnance d'expulsion ou le refus d'approuver la demande d'admission au Canada.

Audition
de l'appel.

20. Tout appel à la Commission doit être entendu en public. Cependant, si l'appelant le demande, la Commission peut, à sa discrétion, décréter que l'audition aura lieu à huis clos.

SÉCURITÉ.

Attestation
du Ministre
et du
solliciteur
général.

21. (1) Nonobstant toute disposition de la présente loi, la Commission ne doit pas

a) dans l'exercice de sa discrétion en vertu de l'article 15, surseoir à l'exécution d'une ordonnance d'expulsion ou, par la suite, prolonger ou renouveler le sursis, annuler une ordonnance d'expulsion, ou ordonner que le droit d'entrée ou de débarquement soit accordé à toute personne, ou

b) rendre une décision, en vertu de l'article 17, portant qu'une personne dont l'admission est parrainée ainsi que le répondant de cette personne se conforment aux exigences mentionnées dans cet article,

s'il est produit auprès de la Commission un certificat signé par le Ministre et par le solliciteur général où ils déclarent qu'à leur avis, fondé sur les rapports de sécurité ou de police criminelle qu'ils ont reçus et étudiés, il serait, pour la Commission, contraire à l'intérêt national de prendre cette mesure.

(2) Tout certificat présenté comme revêtu de la signature du Ministre et du solliciteur général en conformité du paragraphe (1) est réputé revêtu de leur signature et la Commission doit l'admettre sans preuve des signatures ou du caractère officiel des personnes qui semblent l'avoir signé, à moins que le Ministre ou le solliciteur général ne le contestent; ce certificat constitue une preuve péremptoire des énonciations qu'il renferme. Preuve.

COMPÉTENCE EXCLUSIVE DE LA COMMISSION ET APPELS À LA COUR SUPRÊME.

22. Sous réserve des dispositions de la présente loi et sauf ce que prévoit la *Loi sur l'immigration*, la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion ou de la présentation d'une demande d'admission au Canada d'un parent conformément aux règlements édictés sous le régime de la *Loi sur l'immigration*. Compétence de la Commission.

23. (1) Sur une question de droit, y compris une question de juridiction, il peut être porté à la Cour suprême du Canada un appel d'une décision de la Commission visant un appel prévu par la présente loi, si permission d'interjeter appel est accordée par ladite Cour dans les quinze jours après le prononcé de la décision dont est appel ou dans tel délai supplémentaire qu'un juge de cette Cour peut accorder pour des motifs spéciaux. Appel à la Cour suprême du Canada.

(2) Le gouverneur en conseil peut établir des règles régissant la pratique et la procédure relatives aux demandes d'autorisation d'interjeter appel et aux appels à la Cour suprême du Canada en conformité du présent article. Ces règles sont obligatoires, nonobstant toute règle ou pratique par ailleurs applicable. Règles régissant les appels à la Cour suprême du Canada.

(3) Aucune ordonnance quant aux frais ne doit être rendue relativement à une demande d'autorisation d'interjeter appel ou à un appel à la Cour suprême en conformité du présent article. Frais.

MODIFICATIONS CONNEXES.

24. L'alinéa *k*) de l'article 2 de la *Loi sur l'immigration* est abrogé. S.R., c. 325.

25. Le paragraphe (5) de l'article 7 de ladite loi est abrogé et remplacé par ce qui suit:

Le
Ministre
peut
rendre une
ordonnance
d'expulsion.

«(5) Le Ministre peut rendre une ordonnance d'expulsion contre une personne visée par le paragraphe (4)».

26. (1) Les paragraphes (1) et (2) de l'article 8 de ladite loi sont abrogés et remplacés par les suivants:

Délivrance
de permis.

«8. (1) Le Ministre peut délivrer un permis écrit autorisant toute personne à entrer au Canada, ou, étant dans ce pays, à y demeurer, à l'exclusion

a) d'une personne visée par une ordonnance d'expulsion à qui un tel permis n'a pas été délivré avant l'entrée en vigueur du présent paragraphe, ou

b) d'une personne au sujet de laquelle a été interjeté, en vertu de l'article 17 de la *Loi sur la Commission d'appel de l'immigration*, un appel qui a été rejeté.

Validité du
permis.

(2) Un permis doit porter qu'il est en vigueur pour une période déterminée d'au plus douze mois.»

(2) Le paragraphe (4) de l'article 8 de ladite loi est abrogé et remplacé par le suivant:

Déportation
au terme
de la validité
du permis.

«(4) Le Ministre peut, lors de l'annulation ou l'expiration d'un permis, rendre une ordonnance d'expulsion concernant la personne en cause.»

27. L'article 12 de ladite loi est abrogé.

28. L'article 29 de ladite loi est abrogé et remplacé par ce qui suit:

Réouverture
de l'enquête.

«29. Une enquête peut être rouverte par un enquêteur spécial pour l'audition et la réception de quelque preuve ou témoignage supplémentaire, et un enquêteur spécial a le pouvoir, après avoir entendu cette preuve ou ce témoignage supplémentaire, de confirmer, modifier ou révoquer la décision antérieurement modifiée.»

29. Les articles 30 et 31 de ladite loi sont abrogés.

30. L'article 39 de ladite loi est abrogé.

31. L'article 62 de ladite loi est abrogé et remplacé par le suivant :

«**62.** Le Ministre peut établir des règlements, non incompatibles avec la présente loi, visant la procédure à suivre lors des examens et enquêtes prévus par la présente loi ainsi que les devoirs et obligations des fonctionnaires à l'immigration et les méthodes et la procédure à suivre pour l'exécution de ces fonctions et obligations soit au Canada soit ailleurs.»

Règlements
concernant
la procédure,
les fonctions,
etc.

32. Le paragraphe (1) de l'article 64 de ladite loi est abrogé et remplacé par le suivant :

«**64.** (1) Tout document présenté comme étant une ordonnance d'expulsion, une ordonnance de rejet, un mandat, un ordre, une sommation, une directive, un avis ou autre document sous le nom écrit du Ministre, du directeur, d'un enquêteur spécial, d'un fonctionnaire à l'immigration ou autre personne autorisée par la présente loi à établir un semblable document, constitue, dans toute poursuite ou autre procédure sous le régime de la présente loi ou de la *Loi sur la Commission d'appel de l'immigration* ou en découlant, une preuve *prima facie* des faits y contenus et est recevable en preuve sans établissement de la signature ou du caractère officiel de la personne qui semble l'avoir signé à moins que le fait ne soit contesté par le Ministre ou par quelque autre personne agissant pour son compte ou pour Sa Majesté.»

Preuve
des
documents.

DISPOSITIONS TRANSITOIRES.

- 33.** La présente loi s'applique
- a) à toute ordonnance d'expulsion rendue après l'entrée en vigueur de la présente loi, et à toute ordonnance d'expulsion rendue avant l'entrée en vigueur de la présente loi qui n'a pas été exécutée, dans le cas où il n'en a pas été interjeté appel en vertu de l'article 31 de la *Loi sur l'immigration*; et
 - b) à un refus d'approuver une demande d'admission d'un parent, présentée après que le gouverneur en conseil a rendu une ordonnance en conformité de l'article 17 de la présente loi.

ENTRÉE EN VIGUEUR.

Entrée en
vigueur.

34. La présente loi entrera en vigueur à une date
fixée par proclamation du gouverneur en conseil.

ROGER DUHAMEL, M.S.R.C.
IMPRIMEUR DE LA REINE ET CONTRÔLEUR DE LA PAPETERIE
OTTAWA, 1967



MONDAY
November 13, 1967

VOLUME 101
EXTRA

THE CANADA GAZETTE

PART II

STATUTORY ORDERS AND REGULATIONS 1967

Number 559

IMMIGRATION APPEAL BOARD ACT

Immigration Appeal Board Rules

ROGER DUHAMEL, F.R.S.C.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1967

SOR/67-559

IMMIGRATION APPEAL BOARD ACT

Immigration Appeal Board Rules

P.C. 1967-2084

AT THE GOVERNMENT HOUSE AT OTTAWA

THURSDAY, the 2nd day of NOVEMBER, 1967.

PRESENT:

HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL

His Excellency the Governor General in Council, on the recommendation of the Minister of Manpower and Immigration, pursuant to section 8 of the Immigration Appeal Board Act, is pleased hereby to approve the annexed Immigration Appeal Board Rules, effective the 13th day of November, 1967.

IMMIGRATION APPEAL BOARD RULES

1. These Rules may be cited as the *Immigration Appeal Board Rules*.
2. In these Rules,
 - (a) "Act" means the *Immigration Appeal Board Act*;
 - (b) "counsel" means any person authorized by the appellant or respondent to represent him before the Board, and is not restricted to barristers, solicitors or advocates, and in the case of an appellant or respondent who by reason of age or physical or mental condition is unable to act or proceed on his own behalf or to authorize counsel to act for him, includes any person interested in his welfare;
 - (c) "detaining authority" means an immigration officer, constable or peace officer, who holds a person in custody under the authority of the Act or the *Immigration Act*;
 - (d) "immigration officer" has the same meaning as in the *Immigration Act*;
 - (e) "Minister" means the Minister of Manpower and Immigration and includes any person authorized by the Minister to act in his behalf;
 - (f) "record" means
 - (i) in respect of an appeal made pursuant to section 11 or 12 of the Act,
 - (A) a copy of the deportation order,
 - (B) the Minutes of inquiry or further examination,
 - (C) the report of the evidence signed by the Special Inquiry Officer,
 - (D) all exhibits to the inquiry, and
 - (E) all documents made by or at the instance of the Special Inquiry Officer respecting the proceedings before him,
 - (ii) in respect of an appeal made pursuant to section 11 of the Act, in the case of a person ordered deported pursuant to subsection (1) of section 24 of the *Immigration Act* without further examination,
 - (A) a copy of the deportation order, and
 - (B) the report of the Special Inquiry Officer signed by him, and
 - (iii) in respect of an appeal made pursuant to section 17 of the Act,
 - (A) the sponsor's written application,
 - (B) all correspondence between the Department of Manpower and Immigration and the sponsor and the prospective immigrants, and
 - (C) all written reports by immigration officers relating to the refusal of the sponsored application and to the prospective immigrants;
 - (g) "refusal of a sponsored application" means a decision by an immigration officer in Canada or visa officer abroad that the spon-

sor or the person sponsored failed to comply with one or more of the requirements of the *Immigration Act* or the *Immigration Regulations Part 1*; and

- (h) "Special Inquiry Officer" has the same meaning as in the *Immigration Act*.

3. (1) Any appeal made pursuant to the Act shall be by Notice of Appeal.

(2) A Notice of Appeal shall

- (a) contain an address to which notices and papers in connection with the appeal may be sent to the appellant;
- (b) indicate whether the appellant
- (i) wishes to be present or represented by counsel at the hearing of the appeal in order to make oral submissions to the Board;
 - (ii) wishes to make submissions to the Board in writing, or
 - (iii) does not wish to make any submissions to the Board; and
- (c) where the native language of an appellant who wishes to be present or represented by counsel at the hearing of an appeal is not English or French, indicate whether the appellant wishes the Board to provide an interpreter.

Appeals Pursuant to Section 11 of the Act

4. (1) An appeal made pursuant to section 11 of the Act shall be instituted by serving a Notice of Appeal upon the Special Inquiry Officer who presided at the inquiry or further examination or upon an immigration officer.

(2) Subject to subsection (3), service of a Notice of Appeal shall be effected within twenty-four hours of service of the deportation order or within such longer period not exceeding five days as the Chairman in his discretion may allow.

(3) Service of a Notice of Appeal in respect of a deportation order made before the coming into force of the Act which has not been executed and from which no appeal has been taken under section 31 of the *Immigration Act*, shall be effected within ten days of the coming into force of the Act.

(4) Where an officer referred to in subsection (1) is served with a Notice of Appeal, he shall forthwith

- (a) file with the Registrar three copies of the Notice of Appeal and three certified copies of the record;
- (b) serve the Minister with one copy of the Notice of Appeal and the record; and
- (c) serve the appellant with one certified copy of the record.

(5) The Minister may within ten days of service on him of a Notice of Appeal and a copy of the record file a Reply with the Registrar.

(6) The Registrar shall forthwith after the filing of a Reply, serve the appellant and his counsel with a copy of the Reply of the Minister.

Appeals Pursuant to Section 12 of the Act

5. (1) An appeal made pursuant to section 12 of the Act shall be instituted by serving a Notice of Appeal in the form prescribed by the Board, together with a certified copy of the record, upon the person in respect of whom the decision appealed from was made.

(2) Service of a Notice of Appeal shall be effected within thirty days of the decision from which the appeal was made.

(3) The Minister shall forthwith after service of a Notice of Appeal is effected file with the Registrar three copies of the Notice of Appeal and three certified copies of the record together with proof of service thereof.

(4) A Reply shall

(a) be filed with the Registrar by the respondent within thirty days of service on him of the Notice of Appeal and the copy of the record;

(b) contain an address to which notices and papers in connection with the appeal may be sent to the respondent; and

(c) indicate whether the respondent

(i) wishes to be present or represented at the hearing of the appeal in order to make oral submissions to the Board,

(ii) wishes to make submissions to the Board in writing, or

(iii) does not wish to make submissions to the Board; and

(d) where the native language of a respondent who wishes to be present or represented by counsel at the hearing of an appeal is not English or French, indicate whether the respondent wishes the Board to provide an interpreter.

(5) The Registrar shall forthwith after the filing of a Reply, serve the Minister with a copy thereof.

Appeals Pursuant to Section 17 of the Act

6. (1) An appeal made pursuant to section 17 of the Act shall be instituted by serving a Notice of Appeal upon an immigration officer.

(2) Service of a Notice of Appeal shall be effected within thirty days of the date of the refusal from which the appeal is made.

(3) Where an immigration officer is served with a Notice of Appeal, he shall forthwith file with the Registrar three copies of the Notice of Appeal and three certified copies of the record and shall serve the appellant with one certified copy of the record.

(4) The Minister may within ten days of service on an immigration officer of a Notice of Appeal file a Reply with the Registrar.

(5) The Registrar shall forthwith after the filing of a Reply, serve the appellant and his counsel with a copy of the Reply of the Minister.

Withdrawal of Appeals

7. Where a Notice of Appeal has been signed and served, it may be withdrawn only upon written notice signed by the appellant or his counsel, and either

- (a) served upon an immigration officer, who shall forthwith notify the Registrar of such withdrawal; or
- (b) filed with the Registrar.

Hearings of Appeals

8. The Board shall sit at such times and at such places as the Chairman may direct.

9. Notice of the time and place of a hearing shall be sent by the Registrar to the appellant and the respondent and their counsel by registered mail at the addresses set out in the Notice of Appeal or the Reply.

10. Unless the Board directs otherwise, the date set for the hearing of an appeal shall be not less than ten days from the date of mailing of the Notice of Hearing.

11. (1) Except as otherwise provided in these Rules, the appellant or respondent in an appeal may make oral or written submissions to the Board on any matter pertaining to the appeal and, without restricting the generality of the foregoing, may make submissions in respect of the Board's exercise of its discretion pursuant to subsection (1) of section 15 or section 17 of the Act.

(2) An appellant or respondent, whether or not he appears in person before the Board, has the right to be represented by counsel, but at his own expense.

12. (1) Except as otherwise provided in these Rules, all written submissions to the Board by the appellant and the respondent and their witnesses shall be signed by the person making them and verified by affidavit.

(2) All oral submissions by the appellant and the respondent and their witnesses shall be made upon oath or affirmation.

13. (1) The parties to an appeal may call witnesses to give evidence under oath or affirmation.

(2) The expenses of a witness shall be borne by the party calling him.

14. (1) A hearing before the Board shall be conducted in English or French.

(2) The Board shall provide a qualified and competent interpreter if, in its opinion, the services of an interpreter are necessary or if an interpreter is requested by the appellant or respondent.

(3) The cost of any interpreter provided by the Board under subsection (2) shall be borne by the Board.

15. (1) An appellant who is detained pursuant to the Act or the *Immigration Act* and whose release from detention has not been authorized by the Board or pursuant to the provisions of the *Immigration Act* may attend the hearing of his appeal in the custody of an immigration officer.

(2) Where an applicant attends the hearing of his appeal pursuant to subsection (1), all reasonable travelling and living expenses of the

appellant in respect of his attendance at the hearing of his appeal shall be borne by the Board.

16. (1) Where an appellant or a respondent

- (a) wishes to appear before the Board in person at the hearing of his appeal,
- (b) resides in Canada or has been permitted to remain in Canada pending the hearing of the appeal, and
- (c) is situated more than one hundred miles from the place where the hearing respecting him is to be held,

he may make application to the Board for financial assistance, which application shall be certified true and correct by an immigration officer, and filed by the immigration officer with the Registrar not later than five days before the date of the hearing.

(2) Where an application referred to in subsection (1) is approved by a member or officer of the Board, all or part of the reasonable travelling and living expenses in Canada of the applicant in respect of his attendance at the hearing of the appeal shall be borne by the Board.

17. The Board may

- (a) order an adjournment or postponement of the hearing of an appeal;
- (b) allow amendments to be made to any written submission; and
- (c) do all other things necessary to provide for the proper disposition of an appeal.

18. If at the time set for the hearing of an appeal neither of the parties thereto is present and no one is present to represent them, the Board may review the Notice of Appeal and the record together with any written submissions that may have been made to the Board in respect of the appeal and render its decisions thereon.

19. Where either of the parties to an appeal requests the Board to give reasons for its disposition of the appeal, pursuant to subsection (3) of section 7 of the Act, such request shall be made in writing, signed by the party making it or his counsel and filed with the Registrar within thirty days of the date of the disposition of the appeal.

Admissions Pursuant to Section 16 of the Act

20. (1) Where an appellant is allowed to return to Canada pursuant to section 16 of the Act, the Registrar shall give the Minister at least ten days notice in writing of the date on which and the port of entry at which he will come into Canada.

(2) Within five days of the receipt of the notice referred to in subsection (1), the Minister may make representations to the Board respecting the terms and conditions under which the appellant shall be allowed to return to Canada.

(3) The terms and conditions referred to in subsection (2) shall include possession by the appellant of evidence of his readmissibility to the country from which he came to Canada or of his admissibility to some other country.

Quashing and Stay of Execution of Orders of Deportation

21. (1) Where the Board contemplates taking action pursuant to subsection (3) or (4) of section 15 of the Act, it shall so notify the person concerned and the Minister in advance by registered mail.

(2) Within fifteen days of the date of mailing of the notice referred to in subsection (1), the person concerned and the Minister may make written submissions to the Board.

(3) At the request of the person concerned or the Minister, the Chairman may in his discretion allow oral submissions to be made to the Board.

Additional Provisions Respecting Appeals Pursuant to Section 17 of the Act

22. Where the Board has reason to allow an appeal made pursuant to section 17 of the Act against a refusal of a sponsored application, and the refusal was made before the person sponsored had been examined in regard to all the requirements of the *Immigration Act* and the regulations made thereunder relevant to such application, the Board shall direct the Minister to complete the examination without delay and to submit his report thereon to the Board forthwith.

Applications Pursuant to Section 18 of the Act

23. (1) An application for release from detention pursuant to section 18 of the Act shall be instituted by serving an application for release upon the detaining authority.

(2) The detaining authority shall forthwith file with the Registrar the application for release together with any submissions attached thereto.

(3) The Registrar shall forthwith serve the Minister with one copy of the application for release and one copy of any submissions attached thereto.

(4) Within three days of the receipt by him of a notice of application for release, the Minister may file with the Registrar a written submission relating thereto.

(5) In the event that the release of the applicant is ordered by the Board, the Registrar or a member of the Board shall forthwith give written notice to the detaining authority of the right of the applicant to be released from custody.

(6) Where the detaining authority receives the notice referred to in subsection (5), the authority shall release the applicant from custody.

(7) All submissions with respect to an application for release by the applicant or the Minister shall be in writing signed by the person making them.

24. Where an order is made by the Board pursuant to paragraph (b) or (c) of subsection (3) of section 18 of the Act, the Registrar shall forthwith give written notice thereof by registered mail to the Minister and to the person concerned.

Service

25. (1) Except as otherwise provided in these Rules, service of all documents may be effected by personal service or by registered mail.

(2) Where service is effected by registered mail, the effective date of such service shall be the date of mailing.

Time

26. (1) Where there is a reference to a number of days, not expressed to be clear days, between two events, in calculating the number of days there shall be excluded the day on which the first event happened and there shall be included the day on which the second event happened.

(2) Where the time limited for the doing of a thing expires or falls upon a holiday, the thing may be done on the day next following that is not a holiday.



LUNDI
13 novembre 1967

VOLUME 101
Édition spéciale

LA GAZETTE DU CANADA

PARTIE II

DÉCRETS, ORDONNANCES ET
RÈGLEMENTS STATUTAIRES 1967

Numéro 559

LOI SUR LA COMMISSION D'APPEL DE L'IMMIGRATION
Règles de la Commission d'appel de l'immigration

ROGER DUHAMEL, M.S.R.C.
IMPRIMEUR DE LA REINE ET CONTRÔLEUR DE LA PAPETERIE
OTTAWA, 1967

DORS/67-559

LOI SUR LA COMMISSION D'APPEL DE L'IMMIGRATION

Règles de la Commission d'appel de l'immigration

C.P. 1967-2084

HÔTEL DU GOUVERNEMENT À OTTAWA

Le JEUDI 2 novembre 1967.

PRÉSENT:

SON EXCELLENCE LE GOUVERNEUR GÉNÉRAL EN CONSEIL

Sur avis conforme du ministre de la Main-d'œuvre et de l'Immigration et en vertu de l'article 8 de la Loi sur la Commission d'appel de l'immigration, il plaît à Son Excellence le Gouverneur général en conseil de ratifier par les présentes, à compter du 13 novembre 1967, les «Règles de la Commission d'appel de l'immigration», ci-après.

RÈGLES DE LA COMMISSION D'APPEL DE L'IMMIGRATION

1. Les présentes règles peuvent être citées sous le titre: *Règles de la Commission d'appel de l'immigration*.

2. Dans les présentes règles, l'expression

- a) «Loi» désigne la Loi sur la Commission d'appel de l'immigration;
- b) «conseiller» désigne une personne autorisée par l'appelant ou l'intimé à le représenter auprès de la Commission, et ne se limite pas à un avocat ou à un conseiller juridique, et dans le cas d'un appelant ou d'un intimé qui, à cause de son âge ou de sa condition physique ou mentale, est incapable d'agir ou de procéder en son propre nom ou d'autoriser un conseiller à agir en son nom, comprend une personne intéressée à son bien-être;
- c) «préposé à la détention» désigne un fonctionnaire à l'immigration, un constable ou un agent de la paix qui détient sous garde une personne en vertu de la Loi ou de la Loi sur l'immigration;
- d) «fonctionnaire à l'immigration» a la même signification que dans la Loi sur l'immigration;
- e) «Ministre» désigne le ministre de la Main-d'œuvre et de l'Immigration et comprend toute personne autorisée par le Ministre à agir en son nom;
- f) «dossier» signifie
 - (i) à l'égard d'un appel en vertu de l'article 11 ou de l'article 12 de la Loi,
 - (A) une copie de l'ordonnance d'expulsion,
 - (B) le procès-verbal de l'enquête ou de l'examen supplémentaire,
 - (C) le rapport du témoignage signé par l'enquêteur spécial,
 - (D) toutes les pièces versées à l'enquête, et
 - (E) tous les documents préparés par l'enquêteur spécial ou à sa demande, relatifs à l'enquête qu'il a tenue;
 - (ii) à l'égard d'un appel en vertu de l'article 11 de la Loi, dans le cas d'une personne contre laquelle une ordonnance d'expulsion a été rendue en conformité du paragraphe (1) de l'article 24 de la Loi sur l'immigration sans enquête supplémentaire,
 - (A) une copie de l'ordonnance d'expulsion, et
 - (B) le rapport de l'enquêteur spécial portant la signature de ce dernier; et
 - (iii) à l'égard d'un appel en vertu de l'article 17 de la Loi,
 - (A) la demande par écrit du répondant (*sponsor*),
 - (B) toute correspondance entre le Ministère de la Main-d'œuvre et de l'Immigration, le répondant et les personnes dont l'admission a été parrainée, et
 - (C) tous les rapports écrits des fonctionnaires à l'immigration relatifs au refus d'approuver la demande d'admission parrainée et aux personnes dont l'admission a été parrainée;

- g) «refus d'une demande d'admission parrainée» signifie une décision par un fonctionnaire à l'immigration au Canada ou par un préposé aux visas outre-mer à l'effet que le répondant ou la personne dont l'admission a été parrainée ne répond pas aux exigences de la Loi sur l'immigration ou des Règles sur l'immigration, Partie 1; et
 - h) «enquêteur spécial» a la même signification que dans la Loi sur l'immigration.
3. (1) Quiconque veut interjeter appel en vertu de la Loi doit procéder par voie d'avis d'appel.
- (2) L'avis d'appel doit
- a) mentionner une adresse à laquelle les avis et les documents s'y rapportant pourront être envoyés à l'appelant;
 - b) indiquer si l'appelant
 - (i) désire être présent ou être représenté par un conseiller à l'audition de l'appel afin de présenter verbalement à la Commission des arguments ou des preuves;
 - (ii) désire présenter par écrit à la Commission des arguments ou des preuves, ou
 - (iii) ne désire faire aucune observation à la Commission, et
 - c) si la langue maternelle d'un appelant, qui désire être présent ou être représenté par un conseiller à l'audition de l'appel, n'est ni le français ni l'anglais, indiquer si l'appelant désire que la Commission lui fournisse les services d'un interprète.

Appels en vertu de l'article 11 de la Loi

4. (1) Celui qui veut interjeter appel en vertu de l'article 11 de la Loi doit en donner avis à l'enquêteur spécial qui a présidé à l'enquête, à l'examen supplémentaire, ou à un fonctionnaire à l'immigration.

(2) Sous réserve du paragraphe (3), l'avis d'appel doit être signifié dans les vingt-quatre heures de la signification de l'ordonnance d'expulsion ou, à la discrétion du président, dans un délai d'au plus cinq jours.

(3) La signification d'un avis d'appel relativement à une ordonnance d'expulsion rendue avant la mise en vigueur de la Loi, qui n'a pas été exécutée et dont appel n'a pas été interjeté aux termes de l'article 31 de la Loi sur l'immigration, doit être effectuée dans les dix jours de la mise en vigueur de la Loi.

(4) Lorsqu'un avis d'appel est signifié à un fonctionnaire mentionné au paragraphe (1), celui-ci doit immédiatement

- a) déposer auprès du registraire trois copies de l'avis d'appel et trois copies certifiées du dossier;
- b) envoyer au Ministre une copie de l'avis d'appel et du dossier, et
- c) envoyer à l'appelant une copie certifiée du dossier.

(5) Le Ministre peut, dans les dix jours de la signification de l'avis d'appel et de la réception d'une copie du dossier, déposer une réponse auprès du registraire.

(6) Le registraire doit, immédiatement après la réception de la réponse du Ministre, en transmettre une copie à l'appelant et à son conseiller.

Appels en vertu de l'article 12 de la Loi

5. (1) Un appel en vertu de l'article 12 de la Loi est interjeté en signifiant un avis d'appel de la manière prescrite par la Commission, accompagné d'une copie certifiée du dossier, à la personne visée par la décision dont il est fait appel.

(2) La signification de l'avis d'appel doit être effectuée dans les trente jours de la décision dont il est fait appel.

(3) Le Ministre doit, immédiatement après la signification d'un avis d'appel, déposer auprès du registraire trois copies de l'avis d'appel et trois copies certifiées du dossier en même temps que la preuve de la signification.

(4) Une réponse doit

a) être déposée auprès du registraire par l'intimé dans les trente jours de la signification qui lui a été faite de l'avis d'appel et de la réception d'une copie du dossier;

b) mentionner l'adresse à laquelle les avis et les documents relatifs à l'appel devront être envoyés à l'intimé; et

c) indiquer si l'intimé

(i) désire être présent ou être représenté à l'audition de l'appel afin de présenter verbalement à la Commission des arguments ou des preuves;

(ii) désire présenter par écrit à la Commission des arguments ou des preuves, ou

(iii) ne désire faire aucune observation à la Commission, et

d) si la langue maternelle d'un intimé, qui désire être présent ou représenté par un conseiller à l'audition d'un appel, n'est ni l'anglais ni le français, indiquer si l'intimé désire que la Commission lui fournisse les services d'un interprète.

(5) Le registraire doit, immédiatement après la réception d'une réponse, en faire parvenir une copie au Ministre.

Appels en vertu de l'article 17 de la Loi

6. (1) Un appel en vertu de l'article 17 de la Loi est interjeté en signifiant un avis d'appel à un fonctionnaire à l'immigration.

(2) La signification d'un avis d'appel doit être effectuée dans les trente jours de la date du refus dont il est fait appel.

(3) Lorsqu'un avis d'appel est signifié à un fonctionnaire à l'immigration, celui-ci doit immédiatement déposer auprès du registraire trois copies de l'avis d'appel et trois copies certifiées du dossier, et envoyer à l'appelant une copie certifiée du dossier.

(4) Le Ministre peut, dans les dix jours de la signification de l'avis d'appel, déposer une réponse auprès du registraire.

(5) Le registraire doit, immédiatement après la réception de la réponse du Ministre, en transmettre une copie à l'appelant et à son conseiller.

Retrait des appels

7. Lorsqu'un avis d'appel a été signé et signifié, il ne peut être retiré que par un avis écrit, signé par l'appelant ou son conseiller, et doit être

- a) signifié à un fonctionnaire à l'immigration qui avisera immédiatement le registraire de ce retrait; ou
- b) déposé directement auprès du registraire.

Audition des appels

8. La Commission siège aux temps et lieux désignés par le président.

9. Le registraire envoie, par lettre recommandée, un avis du temps et du lieu de l'audition à l'appelant, à l'intimé, et à leur conseiller, aux adresses mentionnées dans l'avis d'appel ou dans la réponse.

10. A moins que la Commission n'en décide autrement, la date fixée pour l'audition d'un appel doit être postérieure d'au moins dix jours à la date de l'envoi par la poste de l'avis d'audition.

11. (1) Sauf lorsque les présentes Règles le stipulent autrement, dans tout appel, l'appelant ou l'intimé peut présenter verbalement ou par écrit à la Commission des arguments ou des preuves relativement à tout ce qui a trait à l'appel, et sans restreindre la généralité de ce qui précède, peut aussi présenter de tels arguments ou preuves à l'égard de l'exercice par la Commission des pouvoirs discrétionnaires qu'elle possède en vertu du paragraphe (1) de l'article 15 ou de l'article 17 de la Loi.

(2) Un appelant ou un intimé, qu'il se présente ou non en personne devant la Commission, a le droit, mais à ses propres frais, d'être représenté par un conseiller.

12. (1) Sauf lorsque les présentes Règles le stipulent autrement, tous les arguments et preuves présentés par écrit à la Commission par l'appelant, l'intimé et leurs témoins doivent être signés par leur auteur et doivent être appuyés d'un affidavit.

(2) Tous les arguments et preuves présentés verbalement par l'appelant, l'intimé et leurs témoins doivent être faits sous serment ou par le moyen d'une déclaration solennelle.

13. (1) Les parties à un appel peuvent faire entendre des témoins sous serment ou par le moyen d'une déclaration solennelle.

(2) Les dépenses d'un témoin sont à la charge de la partie qui l'a convoqué.

14 (1) La Commission entendra les auditions dans les langues anglaise ou française.

(2) La Commission fournira les services d'un interprète qualifié et compétent, si dans son opinion, tels services sont jugés nécessaires, ou si l'appelant ou l'intimé en font la demande.

(3) La Commission assume les frais de tout interprète dont elle fournit les services en vertu du paragraphe 2.

15. (1) Un appelant qui est détenu en vertu de la Loi ou de la Loi sur l'immigration, et dont la libération n'a pas été autorisée par la Commission ou en vertu des dispositions de la Loi sur l'immigration, peut être présent à l'audition de son appel, sous la garde d'un fonctionnaire à l'immigration.

(2) Lorsqu'un appelant assiste à l'audition de son appel en vertu du paragraphe (1), toutes ses dépenses raisonnables de voyage ou de subsistance encourues à cette fin sont à la charge de la Commission.

16. (1) Lorsqu'un appelant ou un intimé

- a) désire se présenter en personne devant la Commission lors de l'audition de son appel,
- b) réside au Canada, ou a obtenu la permission de demeurer au Canada en attendant l'audition de l'appel, et
- c) se trouve à plus de cent milles de l'endroit où l'audition de son appel doit avoir lieu,

il peut faire auprès de la Commission une demande d'aide financière. Cette demande doit être certifiée juste et exacte par un fonctionnaire à l'immigration, et déposée par ce fonctionnaire auprès du registraire au moins cinq jours avant la date de l'audition.

(2) Lorsqu'une demande mentionnée au paragraphe (1) est approuvée par un membre ou un fonctionnaire de la Commission, la totalité ou une partie raisonnable des frais de voyage et de subsistance de l'appelant au Canada, encourus pour être présent à l'audition de son appel, sera payée par la Commission.

17. La Commission peut

- a) ordonner un ajournement ou la remise de l'audition d'un appel;
- b) permettre que l'on fasse des modifications aux arguments et preuves écrits; et
- c) prendre toutes autres mesures nécessaires pour en arriver à une juste décision.

18. Si, au moment fixé pour l'audition de l'appel, aucune des parties n'est présente, ni aucune personne ne comparaît pour les représenter, la Commission peut étudier l'avis d'appel et le dossier ainsi que les arguments et preuves écrits qui lui ont été faits au sujet de l'appel et rendre une décision.

19. Lorsque l'une ou l'autre des parties à un appel demande à la Commission de motiver sa décision, conformément au paragraphe (3) de l'article 7 de la Loi, cette demande doit être faite par écrit et être signée par la personne faisant ladite demande ou par son conseiller et être déposée auprès du registraire dans les trente jours de la date de la décision.

Admissions en vertu de l'article 16 de la Loi

20. (1) Lorsqu'un appelant est autorisé à revenir au Canada en vertu de l'article 16 de la Loi, le registraire doit en aviser le Ministre par écrit, au moins dix jours à l'avance, en indiquant la date et le port d'entrée au Canada.

(2) Dans les cinq jours de la réception de l'avis mentionné au paragraphe (1), le Ministre peut faire des observations à la Commission relativement aux termes et conditions du retour de l'appelant au Canada.

(3) Une des conditions mentionnées au paragraphe (2) doit être que l'appelant possède une preuve de sa réadmissibilité au pays d'où il est venu au Canada; ou de son admissibilité dans un autre pays.

Annulation et sursis d'exécution des ordonnances d'expulsion

21. (1) Lorsque la Commission se propose de prendre des mesures en vertu du paragraphe (3) ou du paragraphe (4) de l'article 15 de la Loi, elle doit au préalable en aviser la personne concernée ainsi que le Ministre, par lettre recommandée.

(2) Dans les quinze jours de la mise à la poste de l'avis mentionné au paragraphe (1), la personne concernée et le Ministre peuvent faire des observations écrites à la Commission.

(3) A la demande de la personne concernée ou du Ministre, le président peut, à sa discrétion, permettre que l'on fasse des observations verbales à la Commission.

*Dispositions supplémentaires relatives aux appels
en vertu de l'article 17 de la Loi*

22. Lorsque la Commission croit devoir accepter un appel interjeté en vertu de l'article 17 de la Loi contre le refus d'une demande d'admission parrainée et que ce refus a été rendu avant que la personne dont l'admission est parrainée ait été examinée en regard de toutes les exigences de la Loi sur l'immigration et des Règles s'y rapportant, la Commission demandera au Ministère de compléter l'examen immédiatement et de présenter son rapport à la Commission sans délai.

Demandes en vertu de l'article 18 de la Loi

23. (1) Une demande de libération de détention en vertu de l'article 18 de la Loi est faite en déposant une demande de libération au préposé à la détention.

(2) Le préposé à la détention doit immédiatement déposer auprès du registraire la demande de libération de même que toute observation qui y est jointe.

(3) Le registraire doit immédiatement faire parvenir au Ministre une copie de la demande de libération ainsi qu'une copie de toute observation qui y est jointe.

(4) Dans les trois jours de la réception d'un avis de demande de libération, le Ministre peut déposer auprès du registraire les observations écrites qu'il juge appropriées.

(5) Dans le cas où la Commission ordonne la libération de l'appelant, le registraire ou un membre de la Commission doit immédiatement aviser par écrit le préposé à la détention du droit de l'appelant à être libéré.

(6) Lorsque le préposé à la détention reçoit l'avis mentionné au paragraphe (5), il doit libérer l'appelant.

(7) Toutes les observations relatives à une demande de libération, faites par l'appelant ou le Ministre, doivent être par écrit et signées par l'auteur.

24. Lorsqu'une ordonnance est rendue par la Commission en vertu de l'alinéa b) ou c) de l'article 18 de la Loi, le registraire doit immédiatement en donner avis écrit, par lettre recommandée, au Ministre et à la personne concernée.

Signification

25. (1) Sauf lorsque les présentes Règles le stipulent autrement, la signification de tout document peut être effectuée de main à main ou par lettre recommandée.

(2) Si la signification est effectuée par lettre recommandée, la date de la signification est la date de mise à la poste.

Délai

26. (1) S'il est fait mention d'un nombre de jours, non indiqués comme jours francs, entre deux événements, le nombre de jours est calculé en excluant le jour où le premier événement se produit et en incluant le jour où le second a lieu.

(2) Si le délai fixé pour l'accomplissement d'une chose expire ou tombe un jour férié, la chose peut être accomplie le premier jour non férié suivant.

MI 81
I 51

11-11-11

IMMIGRATION APPEAL CASES
AFFAIRES D'IMMIGRATION EN APPEL

Selected Judgments – Recueil de jugements

1969

I

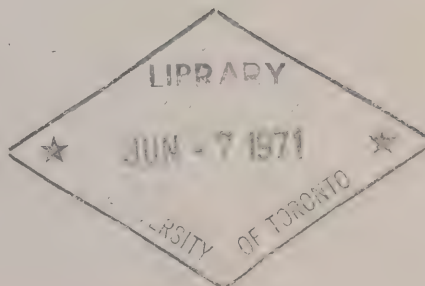
Revised – Révisé

Published under the authority of the Chairman
Immigration Appeal Board

Publié par décision du Président de
La Commission d'appel de l'immigration

CANADA

November 1 novembre
1970



(A) 42 31
I 41

IMMIGRATION APPEAL CASES

AFFAIRES D'IMMIGRATION EN APPEL

Selected Judgments - Recueil de jugements

Cited as (1969) I
I. A. C.

Renvoi (1969) I
A. I. A.

Editor's Note:

This is a revised version of the original 1969 I.A.C. casebook to be used instead of the said original casebook.

N.D.L.R.:

Le présent recueil est une revision du Recueil de jugements 1969. Prière d'utiliser ce nouveau recueil à la place du dit Recueil 1969.

THE BOARD - LA COMMISSION

| | | |
|-----------------|--|---|
| Président | Janet V. Scott | Chairman |
| Vice-présidents | J.C.A. Campbell J.-Paul Geoffroy | Vice-Chairmen Resigned April 18, 1969 a démissionné le 18 avril 1969 |
| Membres | Jean-Pierre Houle A.B. Weselak J.A. Byrne U. Benedetti G. Legaré F. Glogowski | Members |
| Greffier | Roger Hélie | Registrar |
| Arrêtiste | Me Marc A. Parent | Editor |

EDITOR'S NOTE:

The Immigration Appeal Board Act and Rules contained in the original 1969 casebook are still valid and should be retained.

N.D.L.R.:

La Loi et les règles de la Commission d'appel de l'immigration que l'on retrouvera dans le recueil original de 1969 sont toujours en vigueur et devraient être conservées.

TABLE DES JUGEMENTS

TABLE OF JUDGMENTS

| | <u>Number - Numéro</u> | <u>Page</u> |
|--|------------------------|-------------|
| AINA, Femi Ishola..... | 5..... | 52.. |
| BELT-Y-DE CARDENAS, Jorge Alfredo..... | 17..... | 158.. |
| CAUDILL, Randall Jay..... | 12..... | 126.. |
| CHAN, Fung, et al..... | 6..... | 61.. |
| CHLOROS, Mark Alexander, et al..... | 10..... | 112.. |
| DOUCE, John..... | 29..... | 193.. |
| FOLINO, Giuseppe, et al..... | 18..... | 171.. |
| FOUCHÉ, Marie-Thérèse..... | 26..... | 190.. |
| FOULGER, William A.J..... | 20..... | 183.. |
| GIOULEKAS, Anastassios..... | 4..... | 40.. |
| GOLDENBERG, Moshed, et al..... | 24..... | 188.. |
| GRILLO, Giulio..... | 14..... | 139.. |
| MAROUDAS, Georgios..... | 8..... | 84.. |
| MARTIN, John Stanley..... | 19..... | 181.. |
| MAYOUTE, Michelle Auberte..... | 15..... | 142.. |
| MOORE, Donald Edwin..... | 21..... | 184.. |
| MORLEY, Martin Wayne..... | 28..... | 192.. |
| MOSHOS, John, et al..... | 16..... | 146.. |
| PATRINOS, George..... | 9..... | 103.. |
| PETERSEN, Bertram Patrick..... | 2..... | 24.. |
| PILLE, Hilaire Omer..... | 22..... | 186.. |
| PRASAD, Rajendra..... | 11..... | 119.. |
| QUARCINI, Samuel James..... | 3..... | 37.. |
| RAFIK, Mohammed..... | 13..... | 136.. |
| SELINIOTAKIS (PLAKAS), Georgios..... | 25..... | 189.. |
| TONNER, Francis Ian..... | 23..... | 187.. |
| TSANTILI (Iliopoulos), Areti..... | 7..... | 70.. |
| TURPIN, Erskin Maximilian..... | 1..... | 1.. |
| WITTKAMPER, Catherina Wilhelmina Louisa..... | 27..... | 191.. |

1.
Erskin Maximilian TURPIN,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: February 12, 1968;
File: 67-5006.

Coram: Miss J.V. Scott, chairman, Jean-Paul Geoffroy, Gérard Legaré.

S. 23 Report - applicability to persons in Canada. - "Seeking to come into" - defined. - Inquiry - S.I.O. having access to irrelevant or prejudicial evidence - Compellability of subject as witness.- Moral turpitude - defined - Crime involving moral turpitude" - interpreted - Immigration Act: 5(d), 23; Canadian Bill of Rights (1960 R.S.C. c.44) : 2(e) Canada Evidence Act (1952 R.S.C., c. 307): 4,5.

Held:- The phrase "seeking to come into Canada" as used in Section 23, Immigration Act, includes the meaning of "seeking admission" and a Section 23 Report was properly used even though appellant was physically in Canada at the time it was made. Under the Immigration Act a Special Inquiry Officer can properly conduct the Inquiry and make the decision thereon. The fact that he may have access to irrelevant or prejudicial evidence does not automatically invalidate the deportation order. The facts of each case must be examined to see whether this amounts to a denial of natural justice, contrary to the Canadian Bill of Rights. The subject of an inquiry is a compellable witness under the Immigration Act but is entitled to the protection of Section 5 of the Canada Evidence Act. Section 4 of the Canada Evidence Act does not apply. A Special Inquiry Officer, unless he had good reason to refuse, should always summons a witness when requested to do so by the subject of an Inquiry, even though his power to do so is discretionary. The phrase "crime involving moral turpitude" must be interpreted generically and not specifically. The Board cannot go behind a conviction to ascertain the circumstances of the crime in question. If the crime generically, inherently and necessarily involves moral turpitude, it falls within the Act. Moral turpitude implies vileness, depravity, baseness, dishonesty or immorality, and mens rea is consequently a necessary ingredient. In the crime of fraud as defined by the Criminal Code, the state of mind of the accused is a necessary ingredient for conviction. Fraud also necessarily and inherently involves dishonesty, and is consequently a crime involving moral turpitude.

The judgment of the Board was delivered by:

J.V. Scott, Chairman:

1.

Erskin Maximilian TURPIN,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 12 février 1968;
Dossier: 67-5006.

Coram: Mlle J.V. Scott, président, Jean-Paul Geoffroy, Gérard Legaré.

Rapport selon l'article 23 - application à une personne au Canada - "Cherchant à entrer au Canada" - définition. - Enquête - accès par l'enquêteur spécial à une preuve non pertinente ou préjudiciable. - Sujet, comme témoin contraignable. - Turpitude morale - définition - Crime comportant turpitude morale - interprétation. - Loi sur l'immigration: 5(d), 23; Déclaration canadienne des droits (1960, S.R.C., c. 44) : 2(e); Loi sur la preuve au Canada (1952, S.R.C. c. 307): 4,5.

Arrêt:- L'expression "qui cherche à entrer au Canada" telle qu'employée à l'article 23 comprend la signification de "cherchant à être admis" et le rapport fait selon l'article 23 était dans l'ordre même si l'appelant était physiquement au Canada lorsque le rapport fut fait. D'après la Loi sur l'immigration, un enquêteur spécial peut mener l'enquête et prendre la décision pertinente. Le fait qu'il pourrait avoir accès à une preuve non pertinente ou préjudiciable n'invalide pas nécessairement l'ordonnance d'expulsion; les faits de chaque cas doivent être examinés pour voir s'il s'agit d'un déni de justice naturelle, contraire à la Déclaration canadienne des droits de l'homme. Le sujet d'une enquête peut être un témoin contraignable selon la Loi sur l'Immigration mais il a droit à la protection mentionnée à l'article 5 de la Loi de la preuve au Canada. L'article 4 de la Loi de la preuve au Canada ne s'applique pas. Un enquêteur spécial, à moins qu'il ait une bonne raison pour refuser, doit toujours citer un témoin à comparaître, lorsque le sujet de l'enquête le requiert, lors même que son pouvoir de citer soit discrétionnaire. L'expression "crime impliquant turpitude morale" doit être interprétée d'une manière générique et non pas spécifique. La Commission ne doit pas chercher à connaître les antécédants d'une condamnation. Si le crime commis comporte la turpitude morale, d'une manière certaine et inhérente, il tombe sous le coup de la Loi. La turpitude morale comprend la bassesse, la dépravité, la lâcheté, la malhonnêteté ou l'immoralité et la mens rea en est, par conséquent, un élément nécessaire. L'état d'esprit d'un accusé est un élément nécessaire à la condamnation pour fraude tel que défini au Code criminel. La fraude comprend nécessairement la malhonnêteté et est, par conséquent, un crime comportant turpitude morale.

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott, président:

The order of deportation reads:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile; and that
- (3) you are a member of the prohibited class described in paragraph (d) of Section 5 of the Immigration Act in that you have been convicted of a crime involving moral turpitude namely false pretences and that your admission to Canada has not been authorized by the Governor-in-Council".

The inquiry held by Special Inquiry Officer St-Louis, which resulted in this deportation order, was the result of a report made pursuant to Section 23 of the Immigration Act, dated October 2, 1967, a copy of which forms part of the record in this appeal, in the following terms:

E3-35726
Montréal, Québec
October 2, 1967

To: Special Inquiry Officer

Mr. Erskin Maximillian Turpin entered Canada as a non-immigrant visitor at Montreal International Airport on May 17, 1966. He has now ceased to be a non-immigrant and has reported to the undersigned in accordance with subsection (3) of Section 7 of the Immigration Act, and is seeking admission to Canada as a permanent resident.

Pursuant to Section 23 of the Immigration Act I have to report that I have examined Mr. Turpin and in my opinion he is not a Canadian citizen or a person who has acquired Canadian domicile.

I am also of the opinion that it would be contrary, to the Immigration Act to grant his admission to Canada as a permanent resident for the following reasons:

- (i) He is in the prohibited class referred to in paragraph (d) of Section 5 of the Immigration Act by reason of the fact that he has been convicted of a crime involving moral turpitude, namely fraud and his admission to Canada has not been authorized by the Governor-in-Council.

(Signed) E. Richardson
Immigration Officer"

L'ordonnance d'expulsion est rédigée comme suit:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile;
and that
- (3) you are a member of the prohibited class described in paragraph (d) of Section 5 of the Immigration act in that you have been convicted of a crime involving moral turpitude namely false pretences and that your admission to Canada has not been authorized by the Governor-in-Council".

L'enquête qui a donné lieu à cette ordonnance d'expulsion a été tenue par l'enquêteur spécial St-Louis à la suite de la soumission d'un rapport prévu à l'article 23 de la Loi sur l'immigration le 2 octobre 1967. Une copie de ce rapport figure au dossier de l'appel:

E3-35726
Montréal, Québec
October 2, 1967

"To: Special Inquiry Officer

Mr. Erskin Maximillian Turpin entered Canada as a non-immigrant visitor at Montreal International Airport on May 17, 1966. He has now ceased to be a non-immigrant and has reported to the undersigned in accordance with subsection (3) of Section 7 of the Immigration Act, and is seeking admission to Canada as a permanent resident.

Pursuant to Section 23 of the Immigration Act I have to report that I have examined Mr. Turpin and in my opinion he is not a Canadian Citizen or a person who has acquired Canadian domicile.

I am also of the opinion that it would be contrary to the Immigration Act to grant his admission to Canada as a permanent resident for the following reasons:

- (i) He is in the prohibited class referred to in paragraph (d) of Section 5 of the Immigration Act by reason of the fact that he has been convicted of a crime involving moral turpitude, namely fraud and his admission to Canada has not been authorized by the Governor-in-Council.

(Signed) E. Richardson
Immigration Officer"

The appellant, a citizen of the United Kingdom and Colonies, born in Barbados, entered Canada from Denmark as a non-immigrant visitor on May 17, 1966. A few days later, he made application at the Immigration Office in Montreal for admission to Canada, as a landed immigrant, pursuant to Section 7 (3) of the Immigration Act. He was given permission to work in Canada, and did so. On August 22, 1967, he was convicted, by a judge of the Court of Sessions, Montreal, of two offences under Section 323 of the Criminal Code of Canada.

Mr. Turpin is married, having married a Danish national in Montreal in April, 1967. Mr. Turpin's counsel stated at the inquiry and at the hearing of the appeal that Mrs. Turpin has also applied for admission to Canada as a landed immigrant.

Me Zaitlin argued the following points on behalf of the appellant:

1. Since the appellant was physically in Canada as a resident, when the circumstances arose which generated the report and the inquiry, the report should have been made pursuant to Section 19 of the Immigration Act, and the inquiry held only after a direction as provided by Section 26 of the Act. It was strenuously argued that a report under Section 23 should be confined to the case of persons "seeking to come into" Canada - in other words to persons who are not resident in Canada when the report is made.
2. The inquiry by Special Inquiry Officer St-Louis was contrary to natural justice and hence improper in that:
 - a) the Special Inquiry Officer acted as both "prosecutor" and "judge";
 - b) the appellant, Turpin, was required at the inquiry to testify against his own interest, contrary to Section 4 of the Canada Evidence Act;
 - c) Counsel's request to the Special Inquiry Officer during the inquiry, that a witness (an immigration officer) be subpoenaed to testify at the inquiry, was refused;
 - d) improper evidence was introduced at the inquiry, in that the Special Inquiry Officer had before him the "charge sheet" setting out eight criminal charges against Mr. Turpin, six of which were withdrawn before the trial which resulted in Mr. Turpin's conviction on only two of these charges, both pursuant to Section 323 of the Criminal Code of Canada, on August 22, 1967, as aforementioned.

L'appelant, un citoyen du Royaume-Uni et de ses colonies, est né à la Barbade et est venu au Canada comme touriste non-immigrant en provenance du Danemark le 17 mai 1966. Quelques jours plus tard, il a formulé à Montréal une demande d'admission au Canada comme immigrant reçu, conformément à l'article 7(3) de la Loi sur l'immigration. Il a travaillé au Canada, ayant reçu la permission de le faire. Le 22 août 1967 il a été trouvé coupable par un juge de la Cour des sessions à Montréal de deux infractions à l'article 323 du Code criminel du Canada.

M. Turpin est marié. Il a épousé une ressortissante danoise à Montréal en avril 1967. Le procureur de M. Turpin a déclaré à l'enquête et à l'audition de l'appel que Mme Turpin avait elle aussi demandé l'admission au Canada comme immigrante reçue.

Me Zaitlin a présenté les arguments suivants en faveur de l'appelant:

1. Puisque physiquement, l'appelant était au Canada comme résident lorsque se sont produites les circonstances qui ont donné lieu au rapport et à l'enquête, il aurait fallu soumettre le rapport en vertu de l'article 19 de la Loi sur l'immigration et ne tenir l'enquête qu'à la suite d'un ordre prévu à l'article 26 de la Loi. Il a soutenu vigoureusement qu'il fallait limiter l'application du rapport prévu à l'article 23 aux cas de personnes cherchant à venir au Canada et qui ne sont donc pas résidentes au Canada lorsque le rapport est soumis.
2. L'enquête de l'enquêteur spécial St-Louis était contraire à la justice naturelle et par conséquent irrégulière en ce sens que:
 - a) l'enquêteur spécial y était à la fois juge et accusateur;
 - b) l'appelant Turpin a été obligé à l'enquête de témoigner contre ses propres intérêts, contrairement à l'article 4 de la Loi sur la preuve au Canada;
 - c) l'enquêteur spécial a refusé d'accéder à la demande du procureur en vue de convoquer un témoin à l'enquête (il s'agissait d'un fonctionnaire à l'immigration);
 - d) une partie de la preuve administrée à l'enquête était irrégulière du fait que l'enquêteur spécial a eu accès à une liste des délits possibles ("charge sheet") établissant contre M. Turpin huit accusations criminelles dont six ont été retirées avant le procès au cours duquel M. Turpin a été trouvé coupable des

3. The said convictions were not convictions of crimes "involving moral turpitude" as provided by Section 5(d) of the Immigration Act
4. Mr. Turpin's situation was such that, in the event of dismissal of the appeal on legal grounds, the Board could properly exercise the discretion vested in it by Section 15(1)(b)(ii) of the Immigration Appeal Board Act, and quash or stay the deportation order.
- 1) It is clear from the wording of Section 7(3) of the Immigration Act, that when Mr. Turpin applied for admission to Canada as a landed immigrant, he ceased to be a non-immigrant, and his status in Canada changed to that of a person "seeking admission to Canada", as a landed immigrant. Pending processing of his application he remained, legally, in Canada, married, was gainfully employed, and in addition established his own business.

Counsel for both parties were unable to direct the Board to any reported case dealing directly with the argument advanced by Mr. Zaitlin. The wording of the various relevant sections of the Immigration Act must therefore be examined.

Section 7(3) states, in part "Where a person who entered Canada as a non-immigrant ceases to be a non-immigrant ... and ... remains in Canada, he shall forthwith report such facts to the nearest Immigration officer, and present himself for examination ... and shall for the purposes of the examination and all other purposes under this Act, be deemed to be a person seeking admission to Canada.

"Admission" is defined in Section 2(a) as including, among other things, "landing in Canada" and "entry into Canada".

"Landing" is defined by Section 2(n) as "the lawful admission of an immigrant to Canada for permanent residence".

"Entry" is defined by Section 2(f) as "the lawful admission of a non-immigrant to Canada for ... a limited time".

"Admission", as defined in the Act, denotes status. It has no geographical significance. Once a person physically in Canada reports to the nearest Immigration officer, pursuant to Section 7(3), he is deemed to be a person "seeking admission to Canada" and is clearly in no different position from a person, physically outside Canada, who is "seeking admission" to the country.

Me Zaitlin argued, very persuasively, that because Section 23 contains the expression "seeking to come into Canada", its use must be restricted to persons physically outside Canada or at the gates of Canada at a port of entry.

deux autres inculpations relatives à l'article 323 du Code criminel du Canada, le 22 août 1967, comme mentionné ci-devant.

3. Lesdites condamnations n'étaient pas des condamnations pour crimes impliquant turpitude morale, tel que prévu à l'article 5(d) de la Loi sur l'immigration.
4. La situation de M. Turpin est telle que, si la Commission devait rejeter son appel en droit, elle pourrait exercer la discrétion qui lui est attribuée par l'article 15(1)(b)(ii) de la Loi sur la Commission d'appel de l'immigration et annuler ou surseoir à l'ordonnance d'expulsion.
- 1) Le libellé de l'article 7(3) de la Loi sur l'immigration établit clairement que lorsque M. Turpin a demandé à être admis au Canada comme immigrant reçu, il a cessé d'être un non-immigrant et son statut au Canada est devenu celui d'une personne "cherchant à être admise au Canada" comme immigrant reçu. En attendant qu'une décision soit prise sur sa demande, il est demeuré légalement au Canada, s'est marié, a tenu un emploi rémunérateur et il s'est même établi à son propre compte.

Les procureurs de ni l'une ni l'autre des parties n'ont pu renvoyer la Commission à une décision publiée relativement à l'argumentation de M. Zaitlin. Il faut donc étudier le libellé des articles pertinents de la Loi sur l'immigration.

Selon l'article 7(3), "lorsqu'une personne qui est entrée au Canada en qualité de non-immigrant cesse d'être un non-immigrant ... et ... demeure au Canada, elle doit immédiatement signaler ces faits au fonctionnaire à l'immigration le plus rapproché et se présenter pour examen ... et elle est réputée, pour les objets de l'examen et à toutes autres fins de la présente loi, une personne qui cherche à être admise au Canada.

"Admission", selon l'article 2(a), comprend entre autres "la réception au Canada", et "l'entrée au Canada".

Selon l'article 2(n), "réception" signifie "l'admission légale d'un immigrant au Canada aux fins de résidence permanente."

"Entrée" est défini à l'article 2(f) comme étant "l'admission légale d'un non-immigrant au Canada ... pour un temps limité".

L'admission, telle que définie dans la Loi, réfère à un statut. Le mot n'a aucune signification géographique. Dès qu'une personne qui se trouve physiquement au Canada se présente au fonctionnaire à l'immi-

Section 23 is as follows:

"23. Where an Immigration officer, after examination of a person seeking to come into Canada, is of the opinion that it would or may be contrary to a provision of this Act or the regulations to grant admission to or otherwise let such person come into Canada, he may cause such person to be detained and shall report him to a Special Inquiry Officer."

The Oxford dictionary defines "come" as "start, move, arrive, towards or at a point" ... "enter". "Into" "expresses motion or direction to a point within a thing".

In the French version of the Act, the verbs "entrer" or "venir" are employed where the phrase "come into" is used in the English version.

Larousse defines "entrer" as "passer du dehors au dedans, pénétrer" and "venir" as "transporter d'un lieu dans un autre, se rendre chez quelqu'un".

It is clear from a study of the Act as a whole, that where the words "come into" are used in a phrase as an alternative to "admission", as in Section 23 "grant admission to or otherwise let such person come into Canada" or alone, for example Section 19(1)(e)(x) "came into Canada as a member of a crew", the words "come into" must be given their ordinary dictionary meaning, as it were, a geographical meaning, namely physically moving into Canada from outside that country. However, the phrase "seeking to come into Canada", which appears frequently in the Act, and is to be found in Section 23, in order to give effect to the scheme and intention of the Act as a whole, must be given a quasi-technical meaning, as including, but wider than, the meaning of the phrase "seeking admission". Since admission has no geographical connotation, the phrase "seeking to come into" applies to persons "seeking admission" regardless of their physical location or place of residence at the time such admission is sought.

Since Mr. Turpin was a person seeking admission to Canada pursuant to Section 7(3), he was included in the category of persons seeking to come into Canada, and all relevant sections of the Act referring to persons "seeking to come into Canada" apply to him. The inquiry as to his admissibility as a landed immigrant would have been - indeed must have been, since no other section of the Act deals with the situation - conducted pursuant to Section 20. In this connection, it is of interest to examine the case of Rebrin v. Bird, (1961) S.C.R., 376. Miss Rebrin, a resident of Canada, having legally entered the country as a non-immigrant, applied for admission as a landed immigrant pursuant to Section 7(3). A deportation order was issued against her, and she made application for habeas corpus with certiorari in aid. In the course

gration le plus rapproché, conformément à l'article 7(3), elle est réputée être une personne "cherchant à être admise" au Canada et sa situation est tout à fait semblable à celle d'une personne qui, se trouvant à l'extérieur du Canada, "cherche à être admise" dans ce pays.

Me Zaitlin a soutenu d'une façon fort convaincante que puisque l'article 23 contient l'expression "qui cherche à entrer au Canada", cette expression ne doit être utilisée qu'en rapport aux personnes qui se trouvent physiquement à l'extérieur du Canada ou qui sont sur le point d'y entrer à un port d'entrée. L'article 23 est le suivant:

"23. Lorsqu'un fonctionnaire à l'immigration, après avoir examiné une personne qui cherche à entrer au Canada, estime qu'il serait ou qu'il peut être contraire à quelque disposition de la présente loi ou des règlements de lui accorder l'admission ou de lui permettre autrement de venir au Canada, il doit la faire détenir et la signaler à un enquêteur spécial."

Le dictionnaire Oxford donne au mot "come" cette définition: "start, move, arrive, towards or at a point"... "enter". Au mot "into" on trouve: "expresses motion or direction to a point within a thing".

Dans la version française de la Loi, les verbes "entrer" et "venir" traduisent l'expression "come into" de la version anglaise.

Larousse définit "entrer" comme "passer du dehors au dedans, pénétrer" et "venir" comme "se transporter d'un lieu dans un autre, se rendre chez quelqu'un".

La lecture de la Loi dans son ensemble révèle clairement que lorsque les mots "venir" ou "entrer" ("come into") sont utilisés en conjonction alternative avec le mot "admission", comme à l'article 23, "lui accorder l'admission ou lui permettre autrement de venir au Canada", ou lorsque ces mots sont utilisés seuls, comme à l'article 19(1)(e)(x), "est entrée au Canada comme membre d'équipage", il faut leur donner le sens que leur reconnaît le dictionnaire, soit un sens en quelque sorte géographique, puisqu'il s'agit de passer au Canada d'un lieu qui se trouve à l'extérieur de ce pays. Cependant, pour que la Loi dans son ensemble puisse s'appliquer selon son économie et son intention, il faut accorder à l'expression "qui cherche à entrer au Canada", qui est utilisée fréquemment dans la Loi et particulièrement à l'article 23, un sens quasi technique qui comprend celui de l'expression "qui cherche à être admis" mais qui a plus d'extension. Puisque l'admission n'a pas de signification géographique, l'expression "qui cherche à entrer" s'applique aux personnes "qui cherchent à être admises" indépendamment du lieu où elles se trouvent, ou de l'endroit où elles demeurent au moment où elles demandent l'admission.

Puisque M. Turpin était une personne qui cherchait à être admise au Canada en vertu de l'article 7(3), il faisait partie de la classe

of his judgment, Kerwin C.J., remarked at page 378, after referring to Miss Rebrin's application for admission as a landed immigrant, and quoting Section 7(3), "She was therefore properly treated by the Immigration Officer as though she had appeared before him under Section 20(1) of the Immigration Act for examination as to whether she is or is not admissible to Canada ...".

Section 23, pursuant to which the report on Mr. Turpin was made, also applies to "a person seeking to come into Canada". Since this phrase by implication includes a person seeking admission to Canada, which Mr. Turpin was, the report respecting him was correctly made under Section 23. This is so notwithstanding the fact that Mr. Turpin, like Miss Rebrin, was in fact a legal resident of Canada at the time the report was made. It may be noted that a Section 23 report was used in Miss Rebrin's case, and accepted without question by the Court. It does not appear that any argument on this point was raised before the Court.

The Board agrees with Me Zaitlin that Section 19 applies to people physically in or residing in Canada - this is clear from reading the section as a whole - and as Mr. Turpin was a resident, a report concerning him could have been made by an Immigration officer under Section 19. In other words, in circumstances similar to Mr. Turpin's, an Immigration officer has a choice - he may report under Section 19, or under Section 23. That a person in Mr. Turpin's situation has no right to require that a report be made under Section 19 rather than under Section 23 is clear from the principle enunciated by Abbott, J., in Espaillet-Rodriguez v. Queen, (1964) S.C.R. 3, at page 7: "In its essential features the present appeal does not differ in any material respect from that in Ex parte Mannira (1959) O.W.N. 109. In both cases the appellant had entered Canada as a non-immigrant. As such, under Section 7(3) of the Act, he had no higher rights than a would-be immigrant presenting himself at a port of entry for admission as a permanent resident of Canada". Although both Espaillet and Mannira dealt with entirely different sections of the Act than those presently under consideration, the principle stated would appear to be correct and applicable in all circumstances to an applicant under Section 7(3).

(2)(a) Me Zaitlin argued strenuously that the inquiry was improper because, as is usual in immigration inquiries, Mr. St-Louis acted both as "prosecutor" and "judge". The powers and authority of a Special Inquiry Officer in respect of an inquiry are set out in Section 11(3) of the Act as follows:

11.(3) A Special Inquiry Officer has all the powers and authority of a commissioner appointed under Part 1 of the Inquiries Act and, without restricting the generality of the foregoing, may for the purposes of an inquiry,

de personnes qui cherchent à entrer au Canada et tous les articles pertinents de la Loi relatifs aux personnes "qui cherchent à entrer au Canada" s'appliquent à son cas. L'enquête quant à son admissibilité comme immigrant reçu aurait dû être tenue sous le régime de l'article 20; tel a dû être le cas puisqu'aucun autre article de la Loi s'applique à sa situation. Il est d'intérêt d'étudier sous ce rapport l'affaire Rebrin c. Bird, (1961) R.C.S., 376. Mlle Rebrin, une résidente du Canada puisqu'elle était entrée au pays légalement comme non-immigrante, avait demandé l'admission en qualité d'immigrante reçue en vertu de l'article 7(3). Une ordonnance d'expulsion fut rendue contre elle et elle demanda un bref d'habeas corpus avec demande de bref certiorari ancillaire. Ayant évoqué la demande d'admission en qualité d'immigrante reçue formulée par Mlle Rebrin et ayant cité l'article 7(3), le juge Kerwin fit remarquer ceci à la page 378 de son jugement: "She was properly treated by the Immigration Officer as though she had appeared before him under Section 20(1) of the Immigration Act for examination as to whether she is or is not admissible to Canada..."

L'article 23, en vertu duquel le rapport sur M. Turpin a été fait, s'applique aussi à "une personne qui cherche à entrer au Canada". Puisque cette expression inclut par implication une personne qui cherche à être admise au Canada, comme l'était M. Turpin, on a eu raison de faire le rapport à son sujet en vertu de l'article 23. Il en est ainsi indépendamment du fait que M. Turpin, comme Mlle Rebrin, résidait légalement au Canada lorsque le rapport a été fait. Il est à noter que dans le cas de Mlle Rebrin, c'est un rapport prévu à l'article 23 qui a été utilisé et que cette façon de procéder a été acceptée sans objection par la Cour. Aucun argument ne semble avoir été soulevé sur ce point devant la Cour.

La Commission estime, comme Me Zaitlin, que l'article 19 s'applique aux personnes qui résident au Canada ou qui s'y trouvent physiquement: cette interprétation s'impose à la lecture de l'article dans son ensemble. Or, puisque M. Turpin était un résident, le fonctionnaire à l'immigration aurait pu faire le rapport à son sujet sous le régime de l'article 19. En autres mots, dans des circonstances comme celles du cas Turpin, le fonctionnaire à l'immigration a le choix: il peut faire son rapport ou bien en vertu de l'article 19 ou bien en vertu de l'article 23. Le principe énoncé par le juge Abbott à la page 7 du jugement Espaillat-Rodriguez c. la Reine, (1964) R.C.S. 3, exclut nettement qu'une personne se trouvant dans la situation de M. Turpin ait le droit d'exiger que l'enquête soit tenue en vertu de l'article 19 plutôt que de l'article 23: "In its essential features the present appeal does not differ in any material aspect from that in Ex parte Mannira (1959) O.W.N. 109: In both cases the appellant had entered Canada as a non-immigrant. As such, under section 7(3) of the Act, he had no higher rights than a would-be immigrant presenting himself at a port of entry for admission as a permanent resident of Canada." Même si les affaires Espaillat et Mannira traitent

- (a) issue a summons to any person requiring him to appear at the time and place mentioned therein, to testify to all matters within his knowledge relative to the subject matter of the inquiry, and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to the subject matter of the inquiry;
- (b) administer oaths and examine any person upon oath, affirmation or otherwise;
- (c) issue commissions or requests to take evidence in Canada;
- (d) engage the services of such counsel, technicians, clerks, stenographers or other persons as he may deem necessary for a full and proper inquiry; and
- (e) do all other things necessary to provide a full and proper inquiry.

The inquiry must be conducted in accordance with Section 27 and the relevant regulations, and the Act then continues:

Section 28(1) "At the conclusion of the hearing of an inquiry, the Special Inquiry Officer shall render his decision as soon as possible and shall render it in the presence of the person concerned wherever practicable.

(2) Where the Special Inquiry Officer decides that the person concerned is a person who

- (a) may come into or remain in Canada as of right;
- (b) in the case of a person seeking admission to Canada, is not a member of a prohibited class; or
- (c) in the case of a person who is in Canada, is not proven to be a person described in paragraphs (a), (b), (c), (d) or (e) of subsection (1) of section 19,

he shall, upon rendering his decision, admit or let such person come into Canada or remain therein, as the case may be.

(3) In the case of a person other than a person referred to in subsection (2), the Special Inquiry Officer shall, upon rendering his decision, make an order for the deportation of such person".

Subsection(4) of Section 28 is not relevant to the appeal before us.

toutes deux des articles de la Loi autres que celui qui nous concerne présentement, le principe énoncé ici semble être juste et s'appliquer dans toute circonstance à un requérant en vertu de l'article 7(3).

(2)(a) Me Zaitlin a vigoureusement soutenu que l'enquête était irrégulière parce que, comme c'est toujours le cas dans les enquêtes sur l'immigration, M. St-Louis a joué à la fois le rôle de "juge" et "d'accusateur". Les pouvoirs et l'autorité de l'enquêteur spécial en ce qui concerne l'enquête sont définis comme suit à l'article 11(3) de la Loi:

11.(3) Un enquêteur spécial possède tous les pouvoirs et toute l'autorité d'un commissaire nommé en vertu de la partie I de la Loi sur les enquêtes et, sans restreindre la généralité de ce qui précède, peut, aux fins d'une enquête,

- (a) émettre une sommation à toute personne, lui enjoignant de comparaître aux temps et lieu y mentionnés, de rendre témoignage sur toutes les questions à sa connaissance concernant le sujet de l'enquête et d'apporter avec elle et de produire tout document, livre ou pièce, en sa possession ou sous son contrôle, en ce qui regarde le sujet de l'enquête;
- (b) faire prêter serment et interroger toute personne sous serment, affirmation ou autrement;
- (c) émettre des commissions ou requêtes en vue de recueillir des témoignages au Canada;
- (d) retenir les services des avocats, techniciens, commis, sténographes ou autres personnes qu'il estime indispensables à une enquête complète et régulière;
- (e) accomplir toutes autres choses nécessaires pour assurer une enquête complète et régulière."

L'enquête doit être tenue conformément à l'article 27 et aux règlements pertinents et la Loi ajoute ce qui suit:

Article 28(1) "À la conclusion de l'audition d'une enquête, l'enquêteur spécial doit rendre sa décision le plus tôt possible et, si les circonstances le permettent, en présence de la personne intéressée.

(2) Lorsque l'enquêteur spécial décide que la personne intéressée

The Act clearly provides that the Special Inquiry Officer who holds the inquiry shall render the decision thereon. It is true that Section 11(d) provides that he "may, for the purposes of the inquiry" engage the services of such counsel ... as he may deem necessary for a "full and proper inquiry", and (e) "do all things necessary to provide a full and proper inquiry", but both these provisions are permissive, not mandatory.

In the opinion of the Board, the Special Inquiry Officer is in no sense a "prosecutor", nor is he a "judge". He has certain limited judicial functions, but in general, if his inquiry elicits evidence of facts which bring the subject within one or more of the provisions of the Immigration Act, the Special Inquiry Officer must make a decision in accordance with the Act. Me Zaitlin referred to the Section 23 report, which resulted in the inquiry in this case, as a "charge" of an "offence" under the Immigration Act, the "offence" apparently being, in Mr. Turpin's case, that he came within a prohibited class, namely that described in Section 5(d). This terminology would seem to be inexact. "Offence" is defined in Webster as "an infraction of law". Oxford defines it as "a breach of law, duty ... misdemeanour, fault" and cites Wharton "crime". "It is used as a genus comprehending every crime and misdemeanour; or as a species signifying a crime not indictable but punishable summarily or by the forfeiture of a penalty". Jowitt, in defining offence, says, "The word 'offence' has no technical meaning in English Law, but it is commonly used to signify any public wrong, including, therefore, not only crimes or indictable offences, but also offences punishable on summary conviction". Black defines the word as "a crime or misdemeanour; a breach of the criminal laws". Mitchell v. Tracey, (1919) 58 S.C.R. 640, cited by Me Zaitlin, adopts the definition of "crime" in Mann v Owen, 9 B & C 595, "crime" is an offence for which the law awards punishment", - not very helpful to any definition of offence.

As Me Zaitlin himself admitted, and as was held by the B.C. Supreme Court in Re Vergakis, 1964 49 W.W.R. 720, with which the Board agrees on this point, the Immigration Act is not a criminal, but a civil statute. In Vaaro v. R. 1933 S.C.R. 36, Lamont, J., said: "There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge". Part VI of the Act does specifically create certain offences, but those Sections of the Act with which we are now concerned, notably Parts I - III of the Act, simply set up certain standards, though admittedly in a negative way, for the coming into, admission to, or remaining in Canada of persons wishing to do so, who are not citizens of Canada or domiciled in Canada as defined by the Act. Failure to meet, or departure from these standards, may result in the making of a deportation order against the person concerned - a result which may or may not be punitive - but in no sense can such failure be construed as an offence - an infraction of the law - it is at most non-compliance with standards set up by law.

- (a) peut de droit entrer ou demeurer au Canada;
- (b) dans le cas d'une personne cherchant l'admission au Canada, n'est pas membre d'une catégorie interdite; ou
- (c) dans le cas d'une personne au Canada, n'est pas reconnue, par preuve, une personne décrite à l'alinéa a), b), c), d) ou e) du paragraphe (1) de l'article 19,

il doit, en rendant sa décision, admettre ou laisser entrer cette personne au Canada, ou y demeurer selon le cas.

(3) Dans le cas d'une personne autre que celles dont le paragraphe (2) fait mention, l'enquêteur spécial doit, en rendant sa décision, émettre contre elle une ordonnance d'expulsion."

Le paragraphe (4) de l'article 28 n'est pas pertinent à l'appel en instance.

La Loi prévoit explicitement que c'est l'enquêteur spécial qui doit rendre la décision. Il est vrai que l'article 11(d) stipule qu'il "peut, aux fins d'une enquête, retenir les services d'un avocat... qu'il estime indispensables à une enquête complète et régulière", mais ces deux dispositions sont facultatives et non impératives.

La Commission estime que l'enquêteur spécial ne peut être considéré ni comme juge ni comme accusateur. Il a certaines fonctions judiciaires restreintes, mais en général, si d'après les faits mis en preuve à l'enquête, le sujet se trouve visé par une ou plusieurs dispositions de la Loi sur l'immigration, l'enquêteur spécial doit statuer conformément à la Loi. Se référant au rapport prévu à l'article 23 qui a donné lieu à l'enquête dans cette affaire, M. Zaitlin a parlé d'une "inculpation" ("charge") pour une "infraction" ("offence") à la Loi sur l'immigration, l'"infraction" venant présumément du fait que M. Turpin appartenait à une catégorie interdite décrite à l'article 5(b). Cette terminologie ne nous semble pas juste. Le mot "offence" est défini dans Webster comme "infraction of law"; Oxford le définit comme "a breach of law, duty ... misdemeanour, fault" et cite le mot "crime" dans Wharton: "It is used as a genus comprehending every crime and misdemeanour; or as a species signifying a crime not indictable but punishable summarily or by forfeiture of a penalty." Jowitt donne la définition suivante au mot "offence": "The word "offence" has no technical meaning in English Law, but it is commonly used to signify any public wrong, including, therefore, not only crimes or indictable offences, but also offences punishable on summary conviction". Black

In the case before us, Mr. Turpin was not "charged" with anything. The inquiry was directed, in the main, to eliciting information about certain activities of Mr. Turpin which had come to the Special Inquiry Officer's attention and which might bring him within one of the prohibited classes described in the Act, - in other words, the procedure in connection with Mr. Turpin was simply an inquiry within a certain frame of reference. This was within the power of the Special Inquiry Officer as defined in Section 11(3), and after the completion of the inquiry his decision was rendered as required by Section 28.

The conduct of the inquiry in this case, was, as far as the investigation by the Special Inquiry Officer and the rendering of the decision by the same Special Inquiry Officer is concerned, strictly in accordance with the Immigration Act. Was the failure of the Special Inquiry Officer to call counsel to present the Department's case -- as he could have done under the powers vested in him by Section 11(3) -- contrary to the principles of natural justice? Though as indicated above, non-compliance with the standards set up in the Act is not an offence, the consequence of such non-compliance - namely deportation - is generally of such a serious nature that every possible safeguard should be provided for the person concerned. In the case before us, Mr. Turpin appears to have suffered no prejudice from the fact that Mr. St-Louis conducted the inquiry and rendered the decision. This decision was based on the facts proved at the inquiry and on no others - this is clear from a perusal of the record, the minutes of the inquiry and exhibits and attachments thereto. This is so even though Mr. St-Louis had before him and produced, a piece of evidence which he should not have had, namely the "charge sheet" setting out eight alleged offences against the Criminal Code, six of which were withdrawn at the trial of Mr. Turpin on August 22, 1967. This piece of evidence was quite improper, but it is clear that Mr. St-Louis, rightly, was not in any way influenced by it in reaching his decision.

Me Zaitlin cited in support of his argument on this point the case of Szilard v. Szasz, (1955) S.C.R. 3. In that case an arbitrator was found to have been jointly engaged in a real estate speculation with one of the parties, unknown to the other party, and his award was set aside. Rand, J., said at page 4 "From its inception, arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to ..."

The Canadian Bill of Rights, 1960 R.S.C., 44 includes the following provision:

définit ce mot comme "a crime or misdemeanour, a breach of the criminal laws". Le jugement de Mitchell c. Tracey, (1919) 58 R.C.S. 640, cité par M. Zaitlin, adopte la définition donnée au mot crime dans Mann c. Owen, 9 B & S 595: " 'crime' is an offence for which the law awards punishment", définition qui ne nous aide guère à définir le mot "offence".

Comme M. Zaitlin l'a lui même admis et comme il a été décidé par la Cour suprême de la Colombie-Britannique dans l'affaire Re Vergakis, 1964 49 W.W.R. 720, décision avec laquelle la Commission est en accord sur ce point, la Loi sur l'immigration n'est pas un statut criminel mais un statut civil. Dans l'affaire Vaaro c. la Reine, 1933 R.C.S. 36, le juge Lamont affirmait ceci: "There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge." Il est vrai que la Partie VI de la Loi crée spécifiquement certaines infractions, mais les articles de la Loi qui nous concernent ici, soit les Parties I à III de la Loi, ne font qu'établir, même si c'est de façon négative, certaines normes pour l'entrée, l'admission et la résidence au Canada des personnes qui désirent le faire sans être citoyens du Canada ou domiciliés au Canada aux termes de la Loi. La personne qui ne se conforme pas à ces normes ou qui s'en éloigne peut être expulsée par ordonnance; cette ordonnance peut être punitive ou ne pas l'être mais elle ne peut en aucun cas être considérée comme résultant d'une infraction à la Loi: elle résulte tout au plus d'un défaut de se conformer aux normes établies par la Loi.

Dans l'instance, M. Turpin n'a été sujet d'aucune "inculpation". L'enquête avait pour but principal de mettre à jour des renseignements sur certaines activités de M. Turpin qui avaient été portées à l'attention de l'enquêteur spécial, activités qui auraient pu le placer dans une des catégories interdites par la Loi; en autres mots, la procédure suivie dans le cas de M. Turpin ne constituait qu'une enquête dans un cadre de référence donné. Elle relevait de la compétence de l'enquêteur spécial telle que définie à l'article 11(3) et celui-ci, à la fin de l'enquête, a rendu sa décision conformément à l'article 28.

Le fait que ce soit le même enquêteur spécial qui ait fait les constatations et rendu la décision au cours de cette enquête est strictement conforme à la Loi sur l'immigration. L'enquêteur spécial a-t-il agi contrairement aux principes de justice naturelle en négligeant de convoquer un avocat qui présenterait les arguments du ministère, comme il aurait pu le faire en vertu des pouvoirs qui lui sont attribués à l'article 11(3)? Même si, comme nous l'avons déjà dit, le défaut de se conformer aux normes établies par la Loi ne constitue pas une infraction, il a des conséquences tellement sérieuses, soit l'expulsion, que la personne intéressée devrait pouvoir profiter de toutes les garanties possibles. Dans l'instance, M. Turpin ne semble pas avoir été lésé par le fait que M. St-Louis ait tenu l'enquête et rendu la décision. Cette décision était fondée exclusivement sur des faits prouvés à l'enquête: cela ressort nettement à l'examen du dossier

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

"(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;"

There appears to be no reported decision on which this section was directly considered in connection with an inquiry by a Special Inquiry Officer. It was raised, to be sure, in *Re Fraser* 1963 C.C.C. 139, but in that case the deportation order had been made long before the passing of the Bill of Rights, and the Court declined to give the latter Act retroactive effect. In *Rebrin v. Bird*, (1961) S.C.R. 376, the Bill generally was invoked, and was dealt with by the learned judges in general terms notwithstanding that the Bill had been passed after the deportation order in question was made. It does not appear that Me Zaitlin's point, that the Special Inquiry Officer acted improperly in being both "prosecutor" and "judge", was directly raised in the *Rebrin* case, but his reason for raising this point - the fact that the Special Inquiry Officer has before him the whole file which may contain matters prejudicial to the person in question, but which they have no opportunity to examine and answer - was raised in *Rebrin*. It is significant that the learned judges examined the facts, and found that there was "nothing to warrant the suggestion that matters irrelevant to the proper determination of the appeal to the Minister were considered", (per Kerwin, C.J., at p. 382). It would appear, therefore, that the mere possibility of access to irrelevant or prejudicial evidence by the deciding official (in this case the Special Inquiry Officer) does not automatically invalidate a deportation order, notwithstanding the Bill of Rights. The facts of each case must be examined and in the present case there is no evidence of any prejudice whatever to Mr. Turpin arising out of the fact that the Special Inquiry Officer had access to the file, or from the fact that the Special Inquiry Officer conducted the inquiry and rendered the decision.

(b) In view of the finding that non-compliance with the Immigration Act is not an offence, Section 4 of the Canada Evidence Act would appear to be inapplicable to the subject of an Immigration inquiry. This section is as follows:

- 4.(1) Every person charged with an offence is a competent witness for the defence"

Me Zaitlin argued that Mr. Turpin could not be called as a witness by the Special Inquiry Officer since under the terms of Section 4(1) he was

du procès-verbal de l'enquête, des pièces à l'appui et des documents qui leurs sont rattachés. Il en est de même si M. St-Louis a eu accès à un document qu'il a administré en preuve, ce qu'il n'aurait pas dû faire; le document en question consistait en un rôle d'accusations qui portait huit accusations pour infractions au Code criminel, six de ces accusations ayant été retirées avant le procès de M. Turpin le 22 août 1967. Cette preuve était manifestement irrégulière mais il est évident que M. St-Louis n'en a pas tenu compte, et à juste titre, lorsqu'il a pris sa décision.

Pour étayer son argument sur ce point, M. Zaitlin a eu recours à l'affaire Szilard c. Szasz (1955) R.C.S. 3. Dans cette affaire il avait été démontré qu'un arbitre avait spéculé sur des valeurs foncières avec l'une des parties à l'insu de l'autre partie et sa décision avait été renversée. Le juge Rand déclarait à la page 4: "From its inception, arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them, and a fortiori of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to ..."

La Déclaration canadienne des droits (ch.44, S.R.C. 1960) contient la disposition suivante:

2. Toute loi du Canada, à moins qu'une loi du Parlement ne déclare expressément qu'elle s'applique nonobstant la "déclaration canadienne des droits", doit s'interpréter et s'appliquer de manière à ne pas supprimer, restreindre ou enfreindre l'un quelconque des droits ou libertés reconnus ou déclarés aux présentes, ni à en autoriser la suppression, la diminution ou la transmission, et en particulier, nulle loi du Canada ne doit s'interpréter ni s'appliquer comme

"(e) privant une personne du droit à une audition impartiale de sa cause, selon les principes de justice fondamentale, pour la définition de ses droits et obligations;"

Il ne semble pas y avoir de décision publiée où cet article est étudié par rapport à une décision d'un enquêteur spécial. La question a été soulevée, bien entendu, dans l'affaire Re Fraser 1963 C.C.C. 139, mais dans ce cas l'ordonnance d'expulsion avait été rendue bien avant l'adoption de la Déclaration des droits et la Cour avait refusé de donner à cette loi un effet rétroactif. Dans l'affaire Rebrin c. Bird, (1961) R.C.S. 376, la Déclaration dans son ensemble a été invoquée et les honorables juges en ont traité en termes généraux, même si l'ordonnance d'expulsion avait été rendue

a competent witness only for the defence. However, the effect of Section 11(3) and Section 50(e) of the Immigration Act is to make the subject of an inquiry a compellable witness at the inquiry.

Section 11(3) provides that a "Special Inquiry Officer may, for the purpose of an inquiry,

- (a) issue a summons to any person requiring him to appear at the time and place mentioned therein, to testify to all matters within his knowledge relative to the subject matter of the inquiry.....

Section 50 provides every person who

- (e) refuses to answer a question put to him or does not truthfully answer all questions put to him at an examination or inquiry under the Act; is guilty of an offence..

In *Vaaro v. R.* (1933) S.C.R. 36, Lamont, J., said at page 42 "In many cases the immigrant himself must necessarily be the chief witness".

The subject of an inquiry is however entitled to the protection of Section 5 of the Canada Evidence Act, which is as follows:

- "5. (1) No witness shall be excused from answering any question upon the ground that the answer to such question may tend to criminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.
- (2) Where with respect to any person a witness objects to answer upon the ground that his answer may tend to criminate him, or may tend to establish his liability to a civil proceeding, at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering such question, then although the witness is by reason of this Act, or by reason of such provincial Act, compelled to answer, the answer so given shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of such evidence."

In *Re Vergakis* (op. cit.), Hutcheson, J., in Chambers, said (at 727) "counsel for the applicant submits that in giving evidence before a Special Inquiry Officer, the applicant (for a writ of habeas corpus) would not be a 'witness within the meaning of that section, and therefore, would not be entitled to the protection given.'

avant l'adoption de la Déclaration. Le point soulevé par Me Zaitlin, soit que l'action de l'enquêteur spécial était irrégulière du fait qu'il était à la fois "juge" et "accusateur", ne semble pas avoir été soulevé directement dans l'affaire Rebrin, mais la raison pour laquelle Me Zaitlin a eu recours à cet argument, soit le fait que l'enquêteur spécial ait eu accès à un dossier complet qui contenait des renseignements préjudiciables à la personne intéressée sans que celle-ci ait l'occasion d'étudier et de réfuter lesdits renseignements, a été relevée dans l'affaire Rebrin. Il est significatif que les honorables juges, ayant étudié les faits, n'aient rien trouvé "to warrant the suggestion that matters irrelevant to the proper determination of the appeal to the Minister were considered" (le juge Kerwin, p. 382). Il semble donc que, malgré la Déclaration des droits, le seul fait que la personne qui doit prendre la décision (dans ce cas, l'enquêteur spécial puisse avoir accès à une preuve judiciaire non pertinente ou préjudiciable ne suffise pas à invalider automatiquement l'ordonnance d'expulsion. Les faits particuliers à chaque cas doivent être étudiés et dans l'instance rien ne prouve le fait que l'enquêteur spécial ait eu accès au dossier ou que M. Turpin ait eu à subir un tort du fait que ce soit le même enquêteur spécial qui a tenu l'enquête et rendu la décision.

(b) Étant donné qu'il a déjà été affirmé que le défaut de se conformer à la Loi sur l'immigration ne constitue pas une infraction, l'article 4 de la Loi sur la preuve au Canada ne semble pas devoir s'appliquer à une personne qui fait l'objet d'une enquête de l'immigration. Cet article est le suivant:

4.(1) Toute personne accusée d'infraction ... sont habiles à rendre témoignage pour la défense..."

Me Zaitlin a soutenu que M. Turpin ne pouvait pas être convoqué comme témoin par l'enquêteur spécial puisqu'en vertu de l'article 4(1) il n'était habile à témoigner que pour la défense. Cependant, en vertu de l'article 11(3) et de l'article 50(e) de la Loi sur l'immigration, la personne qui fait l'objet de l'enquête peut être tenue de témoigner à l'enquête:

L'article 11(3) stipule que "un enquêteur spécial ... peut aux fins d'une enquête,

(a) émettre une sommation à toute personne, lui enjoignant de comparaître aux temps et lieu y mentionnés, de rendre témoignage sur toutes les questions à sa connaissance concernant le sujet de l'enquête...

L'article 50 stipule qu'est coupable d'une infraction quiconque

"This contention I do not accept: See R. v. Mazerall (1946) O.R. 511 in which McRuer C.J.H.C. stated at page 514:

"As I interpret the authorities, the section applies to any witness lawfully giving evidence under oath before any properly constituted legal tribunal which has the power to take evidence under oath."

The principles enunciated in Batary v. Atty. Gen. for Saskatchewan, (1965) S.C.R. 465, would appear to be inapplicable to the case before us. There, Batary was charged with murder, and it was held (Fauteux, J., dissenting) that the combined effect of ss. 2, 4(1) and (5) of the Canada Evidence Act and ss 448 and 488(3) of the Criminal Code does not render an accused a compellable witness at the coroner's inquest.

(c) The refusal of Special Inquiry Officer St-Louis to issue a summons to Officer Richardson, as requested by Me Zaitlin at the inquiry, was within his jurisdiction under the Act. Section 11(3)(a) is permissive, in that the Special Inquiry Officer may issue a summons. However, as a matter of natural justice, since there is no way in which the subject of an inquiry can compel the attendance of a witness to testify on his behalf, the Special Inquiry Officer should, as a general rule, issue a summons pursuant to Section 11(3) in all cases where such a summons is requested, except where there exist good reasons to refuse. In the case before us, Special Inquiry Officer St-Louis acted wrongly in refusing to summons Officer Richardson when requested by Me Zaitlin, but to send the case back now with direction to reopen the inquiry so that Officer Richardson might be heard would appear to work a greater injustice to Mr. Turpin than the failure of Officer Richardson to appear in the first place.

In the event, Mr. Turpin appears to have suffered no prejudice. The inquiry clearly proved the fact on which the deportation order was based - the conviction - and the circumstances leading up to the conviction, and it is extremely unlikely that testimony by Officer Richardson could have added to or detracted from the evidence actually adduced. The case of Foufas, an unreported decision of the B.C. Court of Appeal (April 28, 1967), which was cited to us by counsel for the Minister, would appear of doubtful value on this point. In that case, Davey, J.A., said "It seems to me quite clear that, under Section 11 of the Act, the obligation (sic) to issue a summons to the witness is based upon the premise that the witness has relevant testimony to give" The learned judge refused to set aside a deportation order on the grounds of refusal to summons a witness, since he was satisfied that the witness' testimony would not have been "relevant". He did not direct his mind to the principles of natural justice. Moreover, from a practical point of view, it is often impossible to tell whether testimony will be relevant until it is heard.

(d) This point has been dealt with under 2(a) above.

- (e) refuse ... de répondre à une question qui lui est posée ou ne répond pas véridiquement à toutes les questions qui lui sont posées au cours d'un examen ou d'une enquête prévue par la présente loi;"...

Dans l'affaire Vaaro c. R. (1933) R.C.S. 36, le juge Lamont déclarait, à la page 42: "In many cases the immigrant himself must necessarily be the chief witness."

La personne qui fait l'objet d'une enquête a cependant droit à la protection de l'article 5 de la Loi sur la preuve au Canada qui prévoit ce qui suit:

- "5. (1) Nul témoin n'est exempté de répondre à une question pour le motif que la réponse à cette question pourrait tendre à l'incriminer, ou pourrait tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit.

(2) Lorsque, relativement à quelque question, un témoin s'oppose à répondre pour le motif que sa réponse pourrait tendre à l'incriminer ou tendre à établir sa responsabilité dans une procédure civile à l'instance de la Couronne ou de qui que ce soit, si, sans la présente loi, ou sans la loi de quelque législature provinciale, ce témoin eût été dispensé de répondre à cette question, alors bien que ce témoin ait été, sous l'autorité de la présente loi ou de quelque loi provinciale, forcé de répondre, sa réponse ne peut être invoquée et n'est pas non plus admissible à titre de preuve contre lui dans une instruction criminelle, non plus que dans une procédure criminelle qui peut être exercée contre lui par la suite, hors le cas de poursuite pour parjure en rendant ce témoignage."

Dans Re Vergakis (op. cit.), le juge Hutcheson déclarait, dans une décision en référé, (p. 727): "counsel for the appellant submits that in giving evidence before a Special Inquiry Officer, the applicant (il s'agit d'une requête de bref d'habeas corpus) would not be 'witness within the meaning of that section, and therefore, would not be entitled to the protection given.'

This contention I do not accept: See R.V. Mazerall (1946) O.R. 511 ... in which McRuer C.J.H.C. stated at page 514:

"As I interpret the authorities, the section applies to any witness lawfully giving evidence under oath before any properly constituted legal tribunal which has the power to take evidence under oath."

Les principes énoncés dans l'affaire Batary c. Atty, Gen. for Saskatchewan, (1965) R.C.S. 465, ne semblent pas devoir s'appliquer

3. The ground for deportation in this case was that Mr. Turpin had been convicted of "a crime involving moral turpitude namely false pretences", thus becoming a member of a prohibited class as described in Section 5(d) of the Act. Documentary evidence of this conviction is provided by a certified copy of a certificate of conviction by a Judge of Sessions, hearing date of August 22, 1967, and showing that Mr. Turpin had pleaded guilty to two counts of fraud, contrary to Section 323 of the Criminal Code of Canada - as follows:

"Furthermore, at Montreal, district of Montreal, on April 7, 1967, Erskine Turpin did unlawfully by deceit, falsehood or other fraudulent means, defraud the Royal Bank of Canada, Montreal Branch, Place Ville Marie, of the sum of \$1,000.00, the property of the said bank, committing thereby an indictable offence, according to Section 323 of the Criminal Code.

Furthermore, at Montreal district of Montreal, on April 7, 1967, Erskine Turpin did unlawfully by deceit falsehood or other fraudulent means, defraud The Royal Bank of Canada, Dorchester & Guy, of the sum of \$500.00, the property of the said bank, committing thereby an indictable offence, according to Section 323 of the Criminal Code."

The certificate of conviction bears the following note as to sentence:

"Vu remboursement intégral: Sentence suspendue & cautionnement personnel \$200.00 de garder la paix durant 2 ans".

Section 323 (1), the relevant subsection of the Code, is as follows:

"323.(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years."

In view of the maximum sentence set out in this subsection, and the actual sentence imposed on Mr. Turpin, it would appear that the learned trial judge took a lenient view of the charge, notwithstanding Mr. Turpin's plea of guilty. His explanation of this plea at the inquiry was that he was frightened, and furthermore did not understand the proceedings at the trial, which took place in French. Mr. Turpin's explanation of the circumstances leading up to the charge and conviction was given in detail at the inquiry, and to a lesser extent, at the hearing of his appeal. This explanation, given under oath, and which the Board considers credible, is that Mr. Turpin drew the cheques, signed by himself and payable to himself, on the expectation that a sum of money sufficient to cover the cheques had been paid in by his business partner to the Banks in question, in one of which Mr. Turpin had an account. Mr. Turpin's testimony before the Board on this point was as follows:

dans l'instance. Batary était accusé de meurtre et il fut décidé (avec dissidence du juge Fauteux) que l'effet combiné des articles 2, 4(1) et 5 de la Loi sur la preuve au Canada d'une part et 448 et 488(3) du Code criminel d'autre part ne permettait pas de contraindre un accusé de témoigner à une enquête du coroner.

(c) Le refus de l'enquêteur spécial St-Louis de délivrer une sommation à l'endroit de M. Richardson, fonctionnaire à l'immigration, comme le demandait M. Zaitlin à l'enquête, était de sa compétence en vertu de la Loi. L'article 11(3)(a) est facultatif, dans ce sens que l'enquêteur spécial peut délivrer une sommation. Cependant, il serait conforme aux principes de justice naturelle, puisque la personne qui fait l'objet de l'enquête ne peut en aucune façon contraindre de comparaître un témoin pour qu'il témoigne en sa faveur, que l'enquêteur spécial accède généralement à toute demande de sommation en vertu de l'article 11(3), à moins d'avoir de bonnes raisons pour refuser. Dans l'instance, l'enquêteur spécial n'a pas agi correctement en refusant de convoquer M. Richardson sur la demande de Me Zaitlin mais si on renvoyait l'affaire maintenant avec l'ordre de réouvrir l'enquête afin de recevoir le témoignage de M. Richardson, l'injustice que M. Turpin aurait à subir serait plus grave que le défaut de comparution de M. Richardson en premier lieu. De toute façon, M. Turpin n'a eu à subir aucun préjudice. L'enquête a nettement prouvé le fait sur lequel se fonde l'ordonnance d'expulsion, soit la condamnation, et les circonstances qui y ont donné lieu, et il est extrêmement probable que le témoignage de M. Richardson ait pu enlever ou ajouter quoique ce soit à la preuve qui a été faite. L'affaire Fofas, une décision non publiée de la Cour d'appel de la Colombie-Britannique (le 28 avril 1967) qui nous a été citée par le procureur du Ministre, ne semble pas être de très grande valeur sur ce point. Dans cette affaire, le juge Daley déclarait: "It seems to me quite clear that, under Section 11 of the Act, the obligation (sic) to issue a summons to a witness is based upon the premise that the witness has relevant testimony to give ...". L'honorable juge a refusé d'annuler l'ordonnance d'expulsion parce qu'il était convaincu que le témoignage en question n'aurait pas été pertinent ("relevant"). Il ne s'est pas arrêté aux principes de justice naturelle. D'ailleurs, sur le plan pratique, il est souvent impossible de juger de la pertinence d'un témoignage avant d'avoir entendu ledit témoignage.

(d) Cette question a été étudiée à l'item 2(a).

3. Dans l'instance, l'expulsion était motivée par le fait que M. Turpin avait été trouvé coupable d'un "crime involving moral turpitude, namely false pretences", et que de ce fait il devenait membre d'une catégorie interdite à l'article 5(d) de la Loi. Le document probant de cette condamnation est la copie certifiée conforme du certificat de condamnation émis par un juge d'audience en date du 22 août 1967; ce document démontre que M. Turpin a plaidé coupable à deux accusations de fraude constituant des infractions à l'article 323 du Code criminel du Canada:

"Counsel:

Mr. Turpin, on October 19, 1967, you appeared before Mr. St-Louis, an Immigration Inquiry Officer and you were questioned in connection with you status in Canada?

Appellant:

Yes.

Counsel:

This inquiry, which began on October 19, was postponed a number of times?

Appellant:

Yes.

Counsel:

On November 16, 1967, you were asked a number of questions by Mr. St-Louis. On page 26, one of the questions put to you is the following:

"When you did make these cheques did you at the time have the necessary funds in the bank to cover the payment of these cheques?

and your answer was:

"Upon expectation of receiving this total amount in the bank at the time that's why the cheques returned NSF."

The next question was:

"Were these cheques made by and for yourself?"

and your answer was:

"That's right."

and to the question

"Did you yourself present them at the bank for payment?"

you answered

"Yes".

and to the question

"How had you anticipated that you would be able to pay these amounts back?"

"Furthermore, at Montreal, district of Montreal, on April 7, 1967 Erskine Turpin did unlawfully by deceit, falsehood or other fraudulent means, defraud the Royal Bank of Canada, Montreal Branch, Place Ville Marie, of the sum of \$1,000.00, the property of the said bank, committing thereby an indictable offence, according to Section 323 of the Criminal Code.

Furthermore, at Montreal district of Montreal, on April 7, 1967, Erskine Turpin did unlawfully by deceit falsehood or other fraudulent means, defraud The Royal Bank of Canada, Dorchester & Guy, of the sum of \$500.00, the property of the said bank, committing thereby an indictable offence, according to Section 323 of the Criminal Code."

Ce certificat de condamnation est annoté comme suit:

"Vu remboursement intégral: Sentence suspendue et cautionnement personnel \$200.00 de garder la paix durant 2 ans".

Le paragraphe pertinent du Code, l'article 323(1) est le suivant:

"323(1) Est coupable d'un acte criminel et passible d'un emprisonnement de dix ans, quiconque, par la supercherie, le mensonge ou d'autres moyens dolosifs, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminé ou non, de quelque bien, argent ou valeur."

Etant donnée la peine maximum prescrite dans ce paragraphe et la peine imposée à M. Turpin, il semblerait que l'honorable juge ait considéré l'accusation avec indulgence, malgré que M. Turpin ait plaidé coupable. Il a expliqué à l'enquête qu'il avait ainsi plaidé parce qu'il avait peur et que par ailleurs il ne comprenait pas la procédure du procès puisque celui-ci se déroulait en français. M. Turpin a donné à l'enquête une explication détaillée des circonstances qui avaient donné lieu à l'accusation et à la condamnation et il a répété cette explication avec moins de détails à l'audition de l'appel. Cette explication, donnée sous serment et considérée comme digne de foi par la Commission, est que M. Turpin a tiré des chèques à son propre nom et signés par lui-même, croyant que son associé en affaires avait déposé aux deux banques en question des sommes suffisantes pour couvrir ces chèques; M. Turpin avait un compte à l'une de ces banques. Le témoignage donné par M. Turpin devant la Commission est le suivant:

"Counsel:

Mr. Turpin, on October 19, 1967, you appeared before Mr. St-Louis, an Immigration Inquiry Officer and you were questioned in connection with your status in Canada?

Appellant:

Yes.

you answered

"I have at present this amount of money owed out to me and it was due to be deposited in the bank. At present I have \$2,200.00 to be deposited in the Bank."

Do you recall that answer?

Appellant:
Yes.

Counsel:
Will you tell the Board exactly what you meant by that answer to that particular question?

Appellant:
I have a business partner, which I still have at present, and he was going to deposit this money that I had withdrawn the cheques for into the bank, which he didn't. The other statement which seems to be interwoven into my answer, is that at the present time that I was sitting with Mr. St-Louis, I had this money from another business going for me also. When I answered this it got a bit misconstrued but this is what I was trying to say. He was supposed to put this money in to cover me when I went to withdraw the money. I asked him if he had deposited the money and he said yes. A few days later he said "I have troubles". I said, "Look, put it in the bank." He still owed me.

Chairman:
Were you expecting your partner to pay the money to two different banks?

Appellant:
Yes.

Commissioner Legaré:
Did you have two accounts?

Appellant:
One in the Royal Bank of Canada in Place Ville Marie. I went to the other bank and withdrew. My partner was supposed to put this money and he didn't. The next time I know I was in big trouble.

Chairman:
He was to put it in both branches?

Appellant:
Yes. I had an account in the Place Ville Marie but not the other.

M. Legaré:
Did you have difficulty in cashing the cheque?

Counsel:

This inquiry, which began on October 19, was postponed a number of times?

Appellant:

Yes.

Counsel:

On November 16, 1967, you were asked a number of question by Mr. St-Louis. On page 26, one of the questions put to you in the following:

"When you did make these cheques did you at the time have the necessary funds in the bank to cover the payment of these cheques?"

and your answer was:

"Upon expectation of receiving this total amount in the bank at the time that's why the cheques returned NSF."

The next question was:

"Where these cheques made by and for yourself?"

and your answer was:

"That's right."

And to the question

"Did you yourself present them at the bank for payment?"

you answered

"Yes".

And to the question

"How had you anticipated that you would be able to pay these amounts back?"

you answered

"I have at present this amount of money owed out to me and it was due to be deposited in the bank. At present I have \$2,200.00 to be deposited in the bank."

Do you recall that answer?

Appellant:
No.

The question before the Board is, was this a "crime involving moral turpitude". It must first be decided whether this phrase must be read in general or in particular. In the case before us, must the crime of fraud always involve "moral turpitude" - in which case the fact of conviction therefor is conclusive - or may the circumstances leading up to the conviction in this particular case be examined by the Board in order to ascertain whether "moral turpitude" was present in Mr. Turpin's conduct?

The phrase "moral turpitude" is foreign to Canadian law and appears to have been borrowed from American immigration law, where it was first introduced in 1891. It first appeared in the Canadian Immigration Act in 1906. There are a good many American cases which seek to define and interpret the term, but only three Canadian cases, none of which, in the Board's opinion, came to grips with the problem.

The generally accepted definition of moral turpitude is to be found in Bouvier's law dictionary:

"An act of baseness, vileness or depravity in the private and social duty which a man owed to his fellow men or to society in general, contrary to the accepted and customary rule or right and duty between man and man (In re Henry, 15 Idaho 755)."

In Hecht v. McFaul, (1961) Que. S.C. 392, one of the three Canadian cases on this point, the learned judge cited, with tacit approval, the definition set out in "Words and Phrases" (U.S.) (1952) Vol. 27, as follows (in part):

"In general "Moral Turpitude" is anything done contrary to justice, honesty, modesty or good morals "Crime malum in se." Generally speaking, crimes malum in se involve moral turpitude."

"The phrase "moral turpitude" has a definite meaning including only the commission of crimes malum in se and those classed as felonies; it is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man, everything done contrary to justice, honesty and good morals"

The Board is in agreement with the remark of Monnin, J., in King v. Brooks, (1960) 3 W.W.R. 673 at p. 683.

"I agree entirely with the American decisions that the word "moral" preceeding the word "turpitude" adds nothing to the meaning of it. It is a pleonasm which has been used only for the sake of emphasis."

Appellant:
Yes.

Counsel:
Will you tell the Board exactly what you meant by that answer to that particular question?

Appellant:
I have a business partner, which I still have at present, and he was going to deposit this money that I had withdrawn the cheques for into the bank, which he didn't. The other statement which seems to be interwoven into my answer, is that at the present time that I was sitting with Mr. St-Louis, I had this money from another business going for me also. When I answered this it got a bit misconstrued but this is what I was trying to say. He was supposed to put this money in to cover me when I went to withdraw the money. I asked him if he had deposited the money and he said yes. A few days later he said "I have troubles." I said, "Look, put it in the bank." He still owed me.

Chairman:
Were you expecting your partner to pay the money to two different banks?

Appellant:
Yes.

Commissioner Legaré:
Did you have two accounts?

Appellant:
One in the Royal Bank of Canada in Place Ville Marie. I went to the other bank and withdrew. My partner was supposed to put this money and he didn't. The next time I know I was in big trouble.

Chairman:
He was to put it in both branches?

Appellant:
Yes. I had an account in the Place Ville Marie but not the other.

M. Legaré:
Did you have difficulty in cashing the cheque?

Appellant:
No.

La Commission doit décider s'il s'agit d'un "crime impliquant turpitude morale". Elle doit d'abord décider si l'expression doit être employée dans un sens général ou particulier. Dans l'instance, le crime

The Board wishes to record its entire disapproval of the use of the phrase "crime involving moral turpitude". It agrees with the opinion expressed by Jackson, J., in his dissenting judgment (con-
 curring in by Frankfurter and Black, J.J.) in Jordan v. DeGeorge,
 (1951) S. Ct. 703, that the phrase "crime involving moral turpitude"
 in the American Immigration Act is so vague and uncertain that to order
 a person deported on the ground of having committed such a crime is to
 deprive such a person of his right to due process. He said, at page
 714: "The test by which vagueness was to be determined according to
 the Connolly case was that Legislation uses terms 'so vague that men of
 Common Intelligence must necessarily guess at its meaning and differ as
 to its application': 269 US 391; 46 S Ct 127. It would seem to be
 difficult to find a more striking instance than we have here of such a
 phrase since it requires even Judges to guess and permits them to differ.
 We do not disagree with a policy of extreme reluctance to adjudge a
 congressional Act unconstitutional but we do not here question the Power
 of Congress to define deportable conduct. We only question the power of
 Administrative Officers and Courts to decree deportation until Congress
 has given an intelligible definition of Deportable Conduct".

The Board, however, must deal with the phrase as it is found
 in the Canadian Immigration Act, and adopting the definitions above set
 out, at least until a better definition can be devised, it appears clear
 that the crime must necessarily involve some element of depravity, base-
 ness, dishonesty, or immorality.

As pointed out above, it is possible to read the phrase "crime
 involving moral turpitude" in two ways. It may be read as referring
 to the particular crime of which the person concerned has been con-
 victed, in which case the Special Inquiry Officer and the Board can go
 behind the conviction to ascertain the circumstances, or it may be read
 as referring generically to the crime of which the person concerned has
 been convicted in which case the Special Inquiry Officer and the Board
 cannot go behind the conviction to ascertain the circumstances, but must
 ascertain if the act leading to the conviction was a crime and if so,
 whether that crime, generically, necessarily involves some element of
 depravity, vileness, baseness, dishonesty or immorality.

The three Canadian cases dealing with moral turpitude did not
 deal directly with this problem. The implication, however, in all these
 cases would appear to be that the second alternative was applied.

In Hecht v. McFaul (supra) an application was made for a writ
 of habeas corpus in respect of a detention pursuant to a deportation
 order made under Section 5(d) of the Immigration Act. The subject of
 the order had been convicted in the U.S. for making false, fictitious
 and fraudulent statements concerning export shipment and for uttering
 a false bill of lading, with intent to defraud. St-Germain, J., said
 at page 395, "Petitioner was not accused of simply having infringed a
 regulation or a law containing no criminal import, but the condemnation

de fraude doit-il toujours impliquer "turpitude morale" (dans ce cas le seul fait d'une condamnation permettrait de conclure) ou la Commission doit-elle étudier les circonstances qui ont conduit à la condamnation dans ce cas particulier afin de déterminer si la conduite de M. Turpin impliquait "turpitude morale"?

L'expression "turpitude morale" est étrangère au droit canadien et semble avoir été empruntée de la loi sur l'immigration des Etats-Unis où elle a été introduite pour la première fois en 1891. Elle paraissait pour la première fois dans la Loi sur l'immigration canadienne en 1906. Il y a un grand nombre de causes américaines qui tentent de définir et d'interpréter ce terme, mais il n'existe que trois causes canadiennes et la Commission estime que dans ni l'un ni l'autre de ces cas le problème n'est abordé de front.

La définition généralement admise de "turpitude morale" se trouve dans le dictionnaire juridique de Bouvier:

"An act of baseness, vileness or depravity in the private and social duty which a man owed to his fellow men or to society in general, contrary to the accepted and customary rule or right and duty between man and man (In re Henry, 15 Idaho 755)."

Dans l'affaire Hecht c. McFaul, (1961) C.S. Québec 392, l'une des trois décisions canadiennes sur cette question, l'honorable juge cite la définition donnée au "Words and Phrases" (U.S.) (1952) vol. 27, et il accorde à cette définition son approbation tacite:

"The phrase "moral turpitude" had a definite meaning including only the commission of crimes malum in se and those classed as felonies; it is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man, everything done contrary to justice, honesty and good morals"

La Commission est d'accord avec la remarque du juge Monnin dans l'affaire King c. Brooks, (1960) 3 W.W.R. 673, à la page 683:

"I agree entirely with the American decisions that the work "moral" preceding the word "turpitude" adds nothing to the meaning of it. It is a pleonasm which has been used only for the sake of emphasis."

La Commission doit se déclarer en complet désaccord avec l'utilisation de l'expression "crime impliquant turpitude morale". Elle accepte l'opinion dissidente émise par le juge Jackson, opinion à laquelle ont souscrit les juges Frankfurth et Black, dans l'affaire Jordan v. DeGeorge (1951) S. Ct. 703; selon cette opinion, l'expression

of petitioner was for making false, fictitious statements with intent to defraud. This is certainly a crime punishable not only in the United States but also in Canada..... Even if it was not punishable by law, it could certainly be declared that the conviction implies a crime of moral turpitude".

It must be pointed out that this case involved an application for a writ of habeas corpus alone with no application for certiorari in aid. The learned judge stated at page 394: "On a writ of habeas corpus, all the Court has to decide is whether or not the detention of petitioner is arbitrary or founded on a text of law. There being no writ of certiorari in aid, the Court may not examine the motives upon which the Special Inquiry Officer or the Appeal Board founded their decision". The learned judge quoted in support of this statement the following extract from Rolling v. Langlais, (1958) Q.B. 207, at page 210: "Bref de certiorari ancillaire seul, peut permettre d'examiner les motifs sur lesquels la Commission d'enquête s'est appuyée pour ordonner la déportation". It may be suggested that the French words "les motifs" mean "grounds" rather than "motives".

In Re Brooks, (1945) 1 D.L.R. 726 (Ontario), Brooks was ordered deported as a member of a prohibited class pursuant to the predecessor of Section 5 (d). The evidence offered before the Special Inquiry Officer was that Brooks had been charged in New Jersey with larceny and pleaded not guilty. He afterwards changed his plea to non vult to receiving and was given a suspended sentence with probation for one year on condition of restitution. At the inquiry Brooks said he was innocent and had never consented to a plea of non vult.

Rose, C.J.H.C., said at page 731: "Foreign law is a fact to be proved, and there being no evidence either as to the meaning or as to the effect in New Jersey of a plea of non vult, I do not think that (the Special Inquiry Officer) had before him any evidence that Brooks had..... been convicted of anything. And even if the record could be treated as evidence of conviction of some offence I think it could not be treated as evidence of conviction of a crime involving "moral turpitude", because (the Special Inquiry Officer) had not before him any evidence as to what is requisite in New Jersey to constitute the offence of "receiving"..... Without knowing the definition of the offence it seems to be very rash to assume that it constitutes a crime involving "moral turpitude".

Although the learned judge did not deal directly with the point, it would appear that he was concerned with the consideration of a crime generically rather than with the circumstances of the particular offence for which the subject was ordered deported.

In King v. Brooks, (1960) 31 W.W.R. 673, which was affirmed without reasons, (1960) 33 W.W.R. 192, King was ordered deported under 5(d) by reason of having been convicted in the United States of, among other

"crime involving moral turpitude" dans l'"American Immigration Act", est tellement vague et incertaine que lorsque l'on ordonne l'expulsion d'une personne en invoquant pour motif qu'elle a commis un tel crime, on la prive de son droit au respect des principes de justice naturelle. Le juge Jackson déclarait, à la page 714: "The test by which vagueness was to be determined according to the Connolly case was that Legislation uses terms 'so vague that men of Common Intelligence must necessarily guess at its meaning and differ as to its application': 269 US 391; 46 S Ct 127. It would seem to be difficult to find a more striking instance than we have here of such a phrase since it requires even Judges to guess and permits them to differ. We do not disagree with a policy of extreme reluctance to adjudge a congressional Act unconstitutional but we do not here question the Power of Congress to define deportable conduct. We only question the power of Administrative Officers and Courts to decree deportation until Congress has given an intelligible definition of Deportable Conduct."

Cependant, la Commission doit prendre l'expression telle qu'elle se trouve dans la Loi sur l'immigration canadienne et, selon les définitions ci-devant données, du moins jusqu'à ce qu'une meilleure définition puisse être formulée, il apparaît nettement que le crime doit nécessairement comporter des éléments de dépravation, de bassesse, de malhonnêteté ou d'immoralité.

Les trois affaires canadiennes où il est question de turpitude morale n'ont pas abordé ce problème directement. Implicitement cependant, il semble que dans ces affaires on ait appliqué la seconde définition.

Dans l'affaire Hecht c. McFaul, on avait demandé un bref d'habeas corpus relativement à la détention du prévenu suite à une ordonnance d'expulsion en vertu de l'article 5(d) de la Loi sur l'immigration. La personne expulsée avait été trouvée coupable aux Etats-Unis d'avoir fait des déclarations fausses, mensongères et dolosives relativement à l'expédition d'exportations et d'avoir présenté un faux connaissance avec intention de fraude. Le juge St-Germain déclarait, à la page 395: "Petitioner was not accused of simply having infringed a regulation or a law containing no criminal import, but the condemnation of petitioner was for making false, fictitious statements with intent to defraud. This is certainly a crime punishable not only in the United States but also in Canada... Even if it was not punishable by law, it could certainly be declared that the conviction implies a crime of moral turpitude."

Il faut noter que dans cette affaire il s'agissait d'une demande de bref d'habeas corpus sans demande de bref de certiorari ancillaire. L'honorable juge déclarait, à la page 394: "On a writ of habeas corpus, all the Court has to decide is whether or not the detention of petitioner is arbitrary or founded on a text of law."

things, passing NSF cheques. No details of the crimes were given at the inquiry and the subject thereof admitted the conviction. An application for certiorari was refused by Monnin J., and it is clear from his judgment that he was considering the crimes generically and not specifically in determining whether "moral turpitude" was inherent therein.

Many American cases have dealt directly with the problem and the Board is impressed with the statement of Noyes, Circuit Judge in U.S. Ex rel. Mylius v Uhl, 203 F 152, at p. 153:

"In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offences I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments or conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude, according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular cases evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws."

An appeal from the decision was dismissed: 210 F 860.

The learned judge has pointed up the inconsistencies and injustices which may result if individual circumstances are examined. If the Special Inquiry Officer and the Board must go behind a conviction to see if the circumstances of the particular crime in question involve

There being no writ of certiorari in aid, the Court may not examine the motives upon which the Special Inquiry Officer or the Appeal Board founded their decision ..." L'honorable juge citait à l'appui de sa déclaration l'extrait suivant de l'affaire Rolling c. Langlais, (1958) B.R. 207, page 210: "Bref de certiorari ancillaire ... seul, peut permettre d'examiner les motifs sur lesquels la Commission d'enquête s'est appuyée pour ordonner la déportation." Rappelons que la traduction anglaise du mot "motifs" est "grounds" plutôt que "motives".

Dans Re Brooks, (1945) 1 D.L.R. 726 (Ontario), l'expulsion de Brooks avait été ordonnée du fait qu'il était membre d'une catégorie interdite en vertu d'une disposition depuis lors remplacée par l'article 5(d). L'enquêteur spécial avait présenté en preuve que Brooks avait été accusé de vol au New-Jersey et qu'il avait plaidé non-coupable. Il était ultérieurement revenu sur sa décision et il avait plaidé non-vult à une accusation de recel et sa peine avait été suspendue avec un an de liberté surveillée sous condition de restitution. A l'enquête Brooks avait maintenu son innocence et déclaré n'avoir jamais consenti à plaider non-vult.

Le juge Rose disait, à la page 731: "Foreign law is a fact to be proved, and there being no evidence either as to the meaning or as to the effect in New Jersey of a plea of non vult, I do not think that (the Special Inquiry Officer) had before him any evidence that Brooks had been convicted of anything. And even if the record could be reated as evidence of conviction of some offence I think it could not be treated as evidence of conviction of a crime involving "moral turpitude", because (the Special Inquiry Officer) had not before him any evidence as to what is requisite in New Jersey to constitute the offence of "receiving" Without knowing the definition of the offence it seems to be very rash to assume that it constitutes a crime involving "moral turpitude".

Quoique l'honorable juge ne se soit pas arrêté spécifiquement à cette question, il semblerait qu'il ait considéré le crime d'une façon générique plutôt que les circonstances de l'infraction particulière pour laquelle le sujet avait été expulsé.

Dans la décision King c. Brooks, (1960) 31 W.W.R. 673, qui a reçu une confirmation sans motifs (1960 33 W.W.R. 192), King a été expulsé en vertu de l'article 5(d) pour avoir été trouvé coupable aux Etats-Unis d'avoir, entre autres choses, fait passer des chèques sans provisions. Le détail des crimes n'a pas été donné à l'enquête et le sujet de l'enquête a admis avoir été condamné. Le juge Monnin a refusé d'accéder à la demande de bref de certiorari et il est clair d'après son jugement qu'il considérerait les crimes d'une façon générique et non spécifique pour déterminer si ils impliquaient turpitude morale.

Un grand nombre d'affaires américaines portent directement sur ce problème et la Commission a été impressionnée par la déclaration du juge Noyes de la Cour de circuit dans l'affaire U.S. Ex rel. Mylius v. Uhl, 203 F 152, à la page 153:

moral turpitude, in some cases, inadequate evidence would be available, in other cases no evidence, in yet other cases complete evidence from the point of view of the person concerned, and in all cases one-sided evidence - that of the person convicted, since it is not in the Special Inquiry Officer's or the Board's power to rehear the evidence which led to the conviction, nor is it generally practical to obtain a transcript of the trial. Fair and consistent treatment of persons ordered deported on the ground of conviction of a crime involving moral turpitude would therefore be an impossibility, and the same arguments apply, though perhaps not as strongly to persons who have admitted committing such a crime.

A further argument in favour of dealing with crimes involving moral turpitude generically rather than individually may be found in considering the Immigration Act as a whole.

Section 19(1)(e)(iii) makes a person subject to deportation who "has been convicted of an offence under the Criminal Code."

Section 19(1)(e)(v) makes a person subject to deportation who "has, since his admission to Canada, become a person who, if he were applying for admission to Canada, would be refused admission by reason of his being a member of a prohibited class other than the prohibited classes described in paragraphs (a), (b), (c) and (s) of Section 5.

We then refer to Section 5(d) of the Act, under which Mr. Turpin was ordered deported, and which described a prohibited class of persons as "persons who have been convicted of or admit having committed any crime involving moral turpitude, except persons whose admission to Canada is authorized by the Governor in Council upon evidence satisfactory to him that:

- (i) at least five years, in the case of a person who was convicted of such crime when he was under twenty-one or more years of age, or at least two years, in the case of a person who was convicted of such crime when he was under twenty-one years of age, have elapsed since the termination of his period of imprisonment or completion of sentence and, in either case, he has successfully rehabilitated himself, or
- (ii) in the case of a person who admits to having committed such crime of which he was not convicted, at least five years, in the case of a person who committed such crime when he was twenty-one or more years of age, or at least two years, in the case of a person who committed such crime when he was under twenty-one years of age, have elapsed since the date of commission of the crime and, in either case, he has successfully rehabilitated himself;"

"In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity. They must follow definite standards and apply general rules. Consequently, in classifying offenses I think that they must designate as crimes involving moral turpitude those which in their inherent nature include it. Their function is not, as it seems to me, to go behind judgments or conviction and determine with respect to the acts disclosed by the testimony the questions of purpose, motive and knowledge which are often determinative of the moral character of acts. Besides, the testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment. In my opinion when it has been shown that an immigrant has been convicted of a crime, the only duty of the administrative officials is to determine whether that crime should be classified as one involving moral turpitude according to its nature and not according to the particular facts and circumstances accompanying a commission of it. I do not think the immigration law intends that where two aliens are shown to have been convicted of the same kind of crime, the authorities should inquire into the evidence upon which they were convicted and admit the one and exclude the other. It is true that if they do not take such course some aliens who have been convicted of high crimes may be excluded although their particular cases evidence no immorality and that some who have been convicted of slight offenses may be admitted although the facts surrounding their commission may be such as to indicate moral obliquity. But such results always follow the use of fixed standards and such standards are, in my opinion, necessary for the efficient administration of the immigration laws."

Un appel de cette décision a été rejeté: 210 F 860.

L'honorable juge a souligné les inconsistences et les injustices qui peuvent résulter de l'examen des circonstances particulières. Si l'enquêteur spécial ou la Commission doivent passer outre à la condamnation pour voir si les circonstances particulières du crime en question comportent un élément de turpitude morale, dans certains cas il n'y aurait pas de preuve disponible; dans d'autres, la preuve disponible ne serait pas suffisante et dans d'autres encore, toute la preuve disponible serait à la décharge de la personne intéressée et dans tous les cas, la preuve serait biaisée en faveur de la personne trouvée coupable puisque l'enquêteur spécial et la Commission n'ont pas la compétence pour ré-entendre la preuve qui a donné lieu à la condamnation et il est généralement difficile d'obtenir la transcription du procès. Il serait donc impossible d'accorder un traitement équitable et consistant aux personnes visées par une ordonnance d'expulsion fondée sur une condamnation antérieure pour crime impliquant turpitude morale et le même argument s'applique, peut-être avec moins de force, aux personnes qui ont avoué avoir commis un tel crime.

Even if we accept the interpretation of the phrase "crime involving moral turpitude" as referring to the inherent nature of a crime, the sections above quoted point up a fundamental - even grotesque - inconsistency in the Act. Persons convicted of an offence under the Criminal Code are subject to deportation under Section 19(1)(e)(ii) whether the offence involves moral turpitude or not. Persons coming within 5(d) are subject to deportation only if they have been convicted (or have admitted committing) a crime involving moral turpitude. To accept the proposition that in the latter case, the circumstances of the particular crime in question may be examined, would be to render the Act even more illogical and inconsistent than it is.

This problem is really pointed up by this appeal, since if Section 19 had been applied in Mr. Turpin's case, he almost certainly would have been ordered deported under Section 19(1)(e)(ii), and the question of moral turpitude would never have arisen.

Though the Board must interpret the particular section of the Act before it, this interpretation must be made in the light of the Act as a whole. The phrase "crime involving moral turpitude" must therefore be taken to refer to the inherent nature of the crime, which will be analyzed in its generic sense to see whether, in the abstract, it necessarily involves moral turpitude.

Mr. Turpin was convicted on two counts, after having pleaded guilty to the offence set out in Section 323(1) of the Criminal Code. Section 323(1) reads as follows:

"323(1). Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property money or valuable security, is guilty of an indictable offence and is liable to imprisonment for ten years."

Does the crime of fraud as defined by this section necessarily involve depravity, vileness, baseness, dishonesty or immorality? Since all these descriptive nouns would appear to imply conscious, voluntary acts, it is first necessary to enquire whether mens rea is a necessary ingredient for conviction under Section 323(1). A study of Tremeeer, 6th Ed., would indicate that it is. The case of R. v Gregg, (1964) 49 W.W.R. 732, is referred to (among others) as authority for the proposition that the state of mind of the accused is an essential ingredient of the offence. Since fraud as described in Section 323(1) necessarily involves dishonesty, it is a crime involving moral turpitude within the meaning of the Immigration Act. The case of King v Brooks (op. cit.) is of interest.

There, evidence was introduced before the Special Inquiry Officer that King had been convicted in the United States of passing NSF cheques. Monnin J., states (at page 683):

L'étude de la Loi sur l'immigration dans son ensemble fournit un autre argument en faveur d'un examen générique plutôt que particulier des crimes impliquant turpitude morale.

L'article 19(1)(e)(ii) rend passible d'expulsion toute personne qui "a été trouvée coupable d'une infraction visée par le Code criminel."

L'article 19(1)(e)(v) rend passible d'expulsion toute personne qui "est, depuis son admission au Canada, devenue une personne qui, si elle demandait son admission au Canada, se la verrait refuser du fait qu'elle est membre d'une catégorie interdite autre que celles dont les alinéas a), b), c) et s) de l'article 5 donnent la description."

Reportons-nous à l'article 5(d) de la Loi, en vertu duquel M. Turpin a été expulsé, et qui décrit comme suit une catégorie interdite: "les personnes qui ont été déclarées coupables de quelque crime impliquant turpitude morale, ou qui admettent avoir commis un tel crime, excepté les personnes dont l'admission au Canada est autorisée par le gouverneur en conseil sur preuve, par lui jugée suffisante,

- (i) qu'au moins cinq années, dans le cas d'une personne trouvée coupable d'un tel crime alors qu'elle était âgée de vingt et un ans ou plus, ou au moins deux années, dans le cas d'une personne déclarée coupable d'un tel crime alors qu'elle avait moins de vingt et un ans, se sont écoulées depuis l'expiration de sa période d'emprisonnement ou l'achèvement de sa sentence et que, dans l'un ou l'autre cas, elle s'est réhabilitée avec succès, ou
- (ii) que, s'il s'agit d'une personne qui admet avoir commis un tel crime dont elle n'a pas été déclarée coupable, au moins cinq années, dans le cas où elle a commis ce crime alors qu'elle était âgée de vingt et un ans ou plus, ou au moins deux années, dans le cas où elle a commis ce crime alors qu'elle avait moins de vingt et un ans, se sont écoulées depuis la date à laquelle le crime a été commis, et, dans l'un ou l'autre cas, qu'elle s'est réhabilitée avec succès;"

Même si nous acceptons d'interpréter l'expression "crime impliquant turpitude morale" comme référant à la nature même du crime, les articles ci-devant cités soulignent une inconsistance fondamentale et même saugrenue dans la Loi. Les personnes déclarées coupables d'une infraction au Code criminel sont passibles d'expulsion en vertu de l'article 19(1)(e)(ii), que l'infraction implique turpitude morale ou non. Les personnes visées par l'article 5(d) sont passibles d'expulsion seulement si elles ont été déclarées coupables d'un crime impliquant turpitude morale ou si elles admettent avoir commis un tel crime.

"I find very little merit in the applicant's claim that the admitted offences of issuing false cheques and being the operator of worthless cheques are not crimes of moral turpitude. These are acts of baseness in the duties which a man owes to his fellow men, contrary to the accepted rule of right and duty between man and his fellow men. Issuing false or worthless cheques, thus depriving fellow citizens of their property, namely their money, can be nothing else than fraudulent and involves moral turpitude. It is certainly something done contrary to justice and honesty"

In view of its decision on the above points, the Board finds that the deportation order against Mr. Turpin was made in accordance with the law, and the appeal must be dismissed. However, since Mr. Turpin was not a permanent resident of Canada at the time the order was made, the Board is empowered to consider the existence of compassionate or humanitarian considerations in determining whether Mr. Turpin is entitled to special relief pursuant to Section 15(1)(b)(ii) of the Immigration Appeal Board Act.

In view of the evidence adduced at the inquiry and at the hearing of the appeal, the Board finds that this is an appropriate case for special relief. Mr. Turpin entered Canada legally, made application for admission as a landed immigrant in accordance with the provisions of the Immigration Act, has had an excellent work record since his arrival in Canada, and has established a small business of his own. In addition, he is married and has established a home in Montreal. His explanation of the circumstances leading up to his conviction in August, 1967, is considered credible by the Board, and goes far to negate any suggestion of criminal intent or of criminal tendencies. The Board, therefore, pursuant to the powers vested in it by Section 15 of the Immigration Appeal Board Act, directs that the deportation order issued against Mr. Turpin be stayed for a period of six months, at the expiration of which the Board will review its decision on this point.

Concurred in by: Jean-Paul Geoffroy, Gérard Legaré.

For the appellant: A.H.J. Zaitlin, Q.C.

For the respondent: Mrs. E.M. Thomas, Q.C.

Si on accepte que dans le deuxième cas il est permis d'examiner les circonstances entourant le crime particulier, on ne fait que rendre la Loi plus illogique et inconsistente qu'elle ne l'est.

Ce problème est réellement soulevé dans l'instance puisque si on avait appliqué l'article 19 au cas de M. Turpin, celui-ci aurait presque surement été expulsé en vertu de l'article 19(1)(e) (iii) et la question de turpitude morale ne se serait jamais posée.

La Commission doit interpréter l'article de la Loi qui lui est spécifiquement soumis, mais elle doit le faire à la lumière de la Loi dans son ensemble. L'expression "crime impliquant turpitude morale" doit donc s'interpréter comme référant à la nature même du crime, qui sera analysé dans son sens générique afin de voir si dans l'abstrait il implique nécessairement turpitude morale.

M. Turpin a été condamné sous deux chefs d'accusation après avoir plaidé coupable à l'infraction établie à l'article 323(1) du Code criminel. L'article 323(1) est le suivant:

"323(1) Est coupable d'un acte criminel et passible d'un emprisonnement de dix ans, quiconque, par la supercherie, le mensonge ou d'autres moyens dolosifs, constituant ou non un faux semblant au sens de la présente loi, frustrer le public ou toute personne, déterminée ou non, de quelque bien, argent ou valeur."

Le crime de fraude, tel que défini dans cet article implique-t-il nécessairement un élément de dépravation, d'abjection, de bassesse, de malhonnêteté ou d'immoralité? Puisque tous ces noms descriptifs semblent impliquer des actes conscients et volontaires il faut d'abord se demander si l'intention criminelle est un élément nécessaire à une condamnation en vertu de l'article 323(1). Tel semblerait être le cas d'après la lecture de Tremear, 6e édition. L'affaire R. c. Gregg, (1964) 49 W.W.R. 732, entre autres, est invoquée comme autorité pour appuyer la proposition selon laquelle l'état d'esprit de l'accusé est un élément essentiel de l'infraction. Puisque la fraude, telle que décrite à l'article 323 (1), implique nécessairement malhonnêteté, elle constitue un crime impliquant turpitude morale aux termes de la Loi sur l'immigration. L'affaire King c. Brooks est pertinente ici.

La preuve avait été faite devant l'enquêteur spécial que King avait été condamné aux États-Unis pour avoir fait passer des chèques sans provisions. Le juge Monnin déclare, à la page 683:

"I find very little merit in the applicant's claim that the admitted offences of issuing false cheques and being the operator of worthless cheques are not crimes of moral turpitude. These are acts of baseness in the duties which a man owe to his fellow men, contrary to the accepted rule of right and duty between man and his fellow men. Issuing

false or worthless cheques, thus depriving fellow citizens of their property, namely their money, can be nothing else than fraudulent and involves moral turpitude. It is certainly something done contrary to justice and honesty"

Etant donnée sa décision sur les questions ci-devant traitées, la Commission estime que l'ordonnance d'expulsion rendue contre M. Turpin est conforme à la Loi et l'appel doit être rejeté. Cependant, puisque M. Turpin n'était pas résident permanent au Canada au moment où l'ordonnance fut rendue, la Commission a compétence pour décider s'il existe des motifs de pitié ou des considérations d'ordre humanitaire qui justifieraient l'octroi à M. Turpin d'un redressement spécial en vertu de l'article 15(1)(b)(ii) de la Loi sur la Commission d'appel de l'immigration.

Etant donnée la preuve administrée à l'enquête et à l'audition de l'appel, la Commission estime qu'il serait approprié d'attribuer un redressement spécial dans cette affaire. M. Turpin est entré au Canada légalement; il a formulé sa demande d'admission comme immigrant reçu conformément aux dispositions de la Loi sur l'immigration; il a établi un excellent dossier de travail depuis son arrivée au Canada et il a établi un modeste commerce à son propre compte. Il est par ailleurs marié et il a établi son foyer à Montréal. La Commission considère comme digne de foi l'explication qu'il a donnée des circonstances qui ont entraîné sa condamnation en août 1967 et trouve que cette explication contribue beaucoup à le soustraire à tout soupçon d'intention criminelle ou de tendances criminelles. Par conséquent, la Commission, en vertu des pouvoirs qui lui sont attribués par la Loi sur la Commission d'appel de l'immigration, ordonne de surseoir à l'exécution de l'ordonnance d'expulsion rendue contre M. Turpin pour une période de six mois; à l'expiration de cette période la Commission ré-examinera sa décision sur ce point.

Ont souscrit: Jean-Paul Geoffroy et Gérard Legaré.

Pour l'appelant: Me A.H.J. Zaitlin, c.r.

Pour l'intimé: Me E.M. Thomas, c.r.

2.

Bertram Patrick PETERSEN,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: February 26, 1968;

File: 68-5024.

Coram: J.C.A. Campbell, Vice-Chairman, Gérard Legaré, U. Benedetti.

Admission under s.34(3)(b) - nature of. - Construction of the words "Notwithstanding Section 28(1) as used in s. 34. - Medical certificate - whether mandatory. - Assessment - Occupational demand - applicants within and outside Canada compared - Arranged employment - modification occurring between assessment and inquiry - effect of - Substitution of opinion as to assessment. - Immigration Regulations: 29(1), 32(2)(c), 34.

Held: The use of Section 28(1) as grounds for a deportation order is quite correct if the person seeking permanent admission fails to meet the conditions and tests set out in Section 34(3)(f). Admission under Section 34(3)(f) is permissive, not mandatory on the part of the Immigration Officer. "If the person concerned fails to meet the conditions for admissibility, then all other requirements of the Immigration Act and Regulations, including Section 28(1) apply". The words "notwithstanding Section 28(1)" as used in Section 34 cannot be construed to mean that Section 28(1) has been repealed. The medical certificate required by Section 29(1) is mandatory. Failure to comply with this requirement is a valid ground for deportation, although if the applicant asked for a medical examination and was refused, the Board might come to a different conclusion. On the question of occupational demand Section 34(3)(f) must be contrasted with Section 32(2)(c) of the Immigration Regulations. An independent applicant in Canada is to be assessed in accordance with the norms set out in Schedule A "except with respect to arranged employment". These words mean that the applicant in Canada must satisfy the assessing officer that the occupation stated in his application is either one at which he is already working or for which he has a definite promise of specific employment. If such arranged employment changes between the time of the original assessment and the inquiry, the Special Inquiry Officer should adjourn the inquiry and have the subject thereof re-assessed. This was not the case here. A Special Inquiry Officer cannot substitute his opinion for that of the assessing officer unless it can be shown that the assessing officer acted on a wrong principle or that on the evidence the decision was manifestly wrong. The appeal was dismissed.

The judgment of the Board was delivered by:

J.C.A. Campbell, Vice-Chairman:

2.
Bertram Patrick PETERSEN,

appelant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 26 février 1968;
Dossier: 68-5024.

Coram: J.C.A. Campbell, vice-président, Gérard Legaré, U. Benedetti.

L'admission en vertu de l'a. 34(3)(b) - nature de. - Portée de l'expression "Nonobstant l'article 28(1)" en l'a. 34. - Certificat médical - si nécessaire. - Evaluation - offres d'emploi - comparaison des personnes formulant demande à l'extérieur du et au Canada - Emploi réservé - changements se produisant entre l'évaluation et l'enquête - effet de - Substitution d'une opinion à l'égard de l'évaluation. - Règlement de l'immigration 29(1), 32(2)(c), 34.

Arrêt: L'article 28(1) peut effectivement motiver une ordonnance d'expulsion dans le cas où la personne qui cherche à être admise à titre permanent ne satisfait pas aux conditions et aux normes d'examen décrites dans l'article 34(3)(f) du Règlement de l'immigration. Suivant l'article 34(3)(f), le fonctionnaire à l'immigration peut admettre un immigrant, sans cependant être obligé de le faire: "Si la personne concernée ne satisfait pas aux conditions d'admission, toutes les autres exigences de la Loi et du Règlement de l'immigration s'appliquent, y compris l'article 28(1)". Les mots "nonobstant les dispositions de l'article 28(1)", dans l'article 34 du Règlement de l'immigration ne peuvent signifier que l'article 28(1) a été abrogé. Le certificat médical requis par l'article 29(1) du Règlement de l'immigration est obligatoire. Le défaut de se conformer à cette exigence est un motif suffisant d'expulsion, quoique la Commission puisse en venir à une conclusion différente si le requérant a demandé un examen médical qu'on lui a refusé. Pour ce qui regarde l'offre d'emploi, on doit opposer l'article 34(3)(f) à l'article 32(2)(c) du Règlement de l'immigration. Un requérant indépendant et résidant à l'extérieur du Canada doit être apprécié suivant l'offre qui existe au Canada pour l'emploi qu'il occupera vraisemblablement. Un requérant indépendant déjà au Canada doit être évalué apprécié selon les normes énoncées à l'annexe "A", "sauf en ce qui a trait à un emploi réservé". Ces termes signifient que le requérant résidant au Canada doit convaincre l'appréciateur qu'il occupe déjà l'emploi déclaré dans sa demande ou qu'il a reçu une promesse certaine d'engagement pour cet emploi. S'il survient des changements quant à l'emploi promis entre le moment de la première appréciation et l'enquête, l'enquêteur spécial doit remettre l'enquête à plus tard et apprécier le requérant à nouveau. Cela n'a pas été le cas ici. Un enquêteur spécial ne peut pas substituer son opinion à

The order of deportatation reads:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile and that;
- 3) you are a member of the prohibited class described under paragraph (t) of section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Regulations by reason of:
 - (i) you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1;
 - (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part 1;
 - (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1."

Petersen, the appellant, was born July 24, 1945, at Capetown, South Africa, the only son of Benjamin Adolph Petersen and Freida née Barnard. His parents and three sisters are resident in Capetown. In South Africa the appellant is known as "coloured", his mother being white and his father a negro. In 1945, his mother, because she was married to a negro, was reclassified by the Government as a "coloured" person. Petersen, who is single, left school about the age of 17, helped his father for approximately one year in a grocery warehouse, did some clerical work, toured as a singer with an operatic company for three months, then became a full-time reporter for the Cape Herald P.T.Y. Limited (a newspaper for "coloureds"). Prior to his employment with the Cape Herald P.T.Y. Limited, he had done some free-lance reporting and sold articles to several other newspapers in Capetown. Petersen entered Canada as a non-immigrant on May 23, 1967, for a period to expire on July 23, 1967. An extension of his non-immigrant status was granted until October 2, 1967. On September 25, 1967, he completed an application for permanent admission to Canada. On his application form, he stated his job in Canada would be that of an apprentice machine operator. He had been promised this employment by Doone Twines Limited, Kitchener, Ontario. He did not take this work as permission to work from the Department of Manpower and Immigration was not received by him until October 24, 1967. However, he subsequently obtained employment with B.F. Goodrich commencing as an apprentice spinning machine operator, six weeks after which he "went on his own". He remained with this firm, B.F. Goodrich, as a spinning machine operator

celle de l'appréciateur, à moins qu'on puisse prouver que l'appréciateur s'est fondé sur un principe faux ou que manifestement il a pris une décision erronée.

Le jugement de la Commission fut rendu par:

J.C.A. Campbell, vice-président:

L'ordonnance d'expulsion est rédigée comme suit:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile and that;
- 3) you are a member of the prohibited class described under paragraph (t) of section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Regulations by reason of:
 - (i) you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, Part 1;
 - (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part 1;
 - (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part 1."

L'appelant Petersen est né le 24 juillet 1945 à Capetown, Afrique du Sud; il est le fils unique de Benjamin Adolph Petersen et de Freida née Barnard. Ses parents et ses trois soeurs demeurent à Capetown. En Afrique du Sud, l'appelant est considéré "de couleur" puisque sa mère est blanche et son père est noir. En 1945, sa mère, parce qu'elle avait épousé un noir, fut reclassifiée par le gouvernement dans la catégorie "de couleur". Petersen, qui est célibataire, a quitté l'école à l'âge de 17 ans; il a travaillé avec son père dans un entrepôt de comestibles pendant environ un an; il a fait du travail de bureau; il a fait une tournée de trois mois comme chanteur avec un troupe d'opéra puis il est devenu journaliste à plein temps à l'emploi du Cape Herald P.T.Y. Limited, un journal réservé aux gens "de couleur". Avant d'entrer à l'emploi du Cape Herald P.T.Y. Limited, il avait fait du journalisme comme pigiste et vendu des articles à plusieurs autres journaux à Capetown. Petersen est arrivé au Canada comme non-immigrant le 23 mai 1967 pour un séjour qui devait prendre fin en juillet 1967. Son statut de non-immigrant fut renouvelé jusqu'au 2 octobre 1967. Le 25 septembre 1967, il a

until January, 1968. He is now employed by Raymond Stanton Public Relations assisting with the preparation of news releases, newsletters and other publications prepared by Raymond Stanton for a number of clients.

There was no dispute regarding the fact that the appellant is not a Canadian citizen nor has he acquired Canadian domicile within the meaning of the Immigration Act.

Counsel for the appellant attacked the validity of the deportation order on the following grounds:

- (1) That Section 34 of the new Immigration Regulations, Part I, clearly envisages the right of applicants who are visitors in Canada under the new regulations to apply without a visa and therefore to that extent the previous requirements for a visa contained in Section 28(1) of the earlier Immigration Regulations must be regarded as being repealed.
- (2) That at no stage during the Inquiry or before it was the appellant asked to have or given any opportunity for examination by a Medical Officer appointed by the Department and he had no knowledge where or how he should apply and no opportunity was afforded him to get a medical certificate.
- (3) That the Special Inquiry Officer misdirected himself by considering only the occupational demand for the occupation of a machine operator, for which the appellant was given the mark of "O", and which was not the occupation for which he was qualified. That both the Special Inquiry Officer and the officer who assessed the appellant erred in principle in not directing their minds to the assessment in regard to the occupational demand for which the appellant was qualified.

Mr. Brewin referred to the provisions of Section 34 of the current Immigration Regulations, Part I, which deals with applicants in Canada who enter as non-immigrants under Section 7(1) of the Immigration Act and who subsequently apply for permanent admission. He argued that if an applicant in Canada is given the right to apply under Section 34 of the Immigration Regulations, Part I, the assumption must be and it is fairly obvious that he cannot be expected to have an immigrant visa as required by Section 28(1) of the Regulations, which can only be obtained from a visa officer stationed outside of Canada, or in the alternative the non-immigrant visa, which the applicant has, is a visa in accordance with Section 28(1) of the Immigration Regulations. Therefore to use Section 28(1) as a ground for deportation in this case is improper as it is not a valid ground. Mr. Gill, Counsel for the Minister, argued

formulé une demande d'admission permanente au Canada. Il a indiqué sur sa formule de demande qu'il avait l'intention de faire son apprentissage comme assistant-machiniste. La Doone Twines Limited de Kitchener, Ontario, lui avait promis cet emploi. Il n'a pas pris ce travail puisqu'il n'a reçu la permission de travailler du ministère de la Main-d'oeuvre et de l'Immigration que le 24 octobre 1967. Cependant, il a par après accepté un emploi avec la B.F. Goodrich, où il a commencé par faire son apprentissage comme fileur. Au bout de six mois il avait terminé son apprentissage ("went on my own"). Il est demeuré à l'emploi de la B.F. Goodrich comme fileur jusqu'en janvier 1968. Il est maintenant employé par la Raymond Stanton Public Relations où il participe à la rédaction de communiqués de presse, de bulletins d'information et d'autres publications préparées par Raymond Stanton pour un certain nombre de clients. Personne n'a contesté le fait que l'appelant n'est pas un citoyen canadien et qu'il n'a pas acquis le domicile canadien aux termes de la Loi sur l'immigration.

Le conseiller de l'appelant a mis en doute la validité de l'ordonnance d'expulsion pour les motifs suivants:

- (1) L'article 34 de la Partie I du nouveau Règlement sur l'immigration reconnaît nettement aux requérants qui sont des visiteurs au Canada en vertu du nouveau règlement le droit de formuler leur demande sans être en possession d'un visa; les exigences quant aux visas formulées à l'article 28(1) de l'ancien Règlement sur l'immigration doivent donc être considérées comme annulées dans un tel cas.
- (2) Personne n'a demandé à l'appelant, ni avant ni au cours de l'enquête de se soumettre à un examen médical par un médecin du Ministère et personne ne lui a fourni l'occasion de le faire; il ne savait donc ni où ni comment adresser sa demande et donc on ne lui a pas donné l'occasion d'obtenir un certificat médical.
- (3) L'enquêteur spécial s'est trompé en ne considérant au titre des offres d'emploi que la profession de machiniste: l'appelant, n'ayant pas les qualifications de cette profession, a reçu une note de "0". L'enquêteur spécial et le fonctionnaire préposé à l'appréciation ont commis une erreur de principe en négligeant de faire porter leur appréciation sur les offres d'emploi dans la profession pour laquelle l'appelant était qualifié.

M. Brewin a invoqué les dispositions de l'article 34 de la Partie I du Règlement sur l'immigration actuel qui porte sur les requérants se trouvant au Canada qui, une fois entrés comme non-immigrants en vertu de l'article 7(1) de la Loi sur l'immigration, formulent une demande d'admission permanente. Il a soutenu que si l'on accorde à un requérant se trouvant au Canada le droit de faire sa demande en vertu

that Petersen's application for permanent residence in Canada was accepted in accordance with the provisions of the Immigration Regulations as they apply to an independent applicant. As such an applicant, he was required to obtain 50 units of assessment after being examined in accordance with Schedule "A". He obtained only 39 points on assessment which said assessment was made on exactly the same basis as if Petersen had applied overseas, with the exception of arranged employment. Therefore he would have been denied a visa overseas. That being so, there was no jurisdiction in the Immigration officer to set the visa requirements aside and the requirement, in this case the lack of an immigrant visa, was properly applied.

Section 34(3) of the Immigration Regulations, Part I, is as follows:

"34.(3) Notwithstanding section 28, an applicant in Canada who

- (a) if outside Canada would be an independent applicant; and
- (b) is not in possession of an immigrant visa or letter of pre-examination but, in the opinion of an immigration officer, would on application be issued a visa or letter of pre-examination if outside Canada;

may be admitted to Canada for permanent residence if

- (c) he complies with the requirements of the Act and these Regulations;
- (d) he makes application in the form prescribed by the Minister before the expiration of the period of temporary stay in Canada authorized for him by an Immigration officer;
- (e) he has not taken employment in Canada without the written approval of an officer of the Department; and
- (f) in the opinion of an Immigration officer, he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment."

Prior to the rendering of these reasons for disposal of this appeal these same two points (i.e.) lack of a valid and subsisting immigrant visa and medical certificate as required by Sections 28(1) and 29(1) of the Immigration Regulations, Part I, were considered in the case of the appeal of Aubrey Wellesley Jackson, Immigration Appeal Board file 68-5053, on Tuesday February 27, 1968. In that case Mr. Jackson was ordered deported on the following grounds:

"I have reached the decision that you may not come into or remain in Canada as of right in that

de l'article 34 de la Partie I du Règlement sur l'immigration, il faut supposer, et c'est à peu près évident, que le requérant n'est pas tenu d'avoir un visa d'immigrant comme l'exige l'article 28(1) du Règlement puisque ce visa ne peut être délivré que par un préposé aux visas en fonction à l'étranger ou que, autrement, le visa de non-immigrant que le requérant possède satisfait aux exigences de l'article 28(1) du Règlement sur l'immigration quant au visa. Par conséquent il est irrégulier d'invoquer l'article 28(1) pour motiver une expulsion et ce motif n'est pas valide. M. Gill, conseiller du Ministre, a soutenu que la demande de résidence permanente au Canada déposée par Petersen avait été acceptée conformément aux dispositions du Règlement sur l'immigration visant les requérants indépendants. Comme requérant indépendant il devait accumuler 50 points d'appréciation lors d'un examen conforme à l'annexe A. Il n'a obtenu que 39 points et les critères selon lesquels il a été apprécié auraient été exactement les mêmes, excepté en ce qui concerne l'emploi réservé, s'il avait été examiné à l'étranger. Le visa lui aurait par conséquent été refusé à l'étranger. Puisqu'il en est ainsi, le fonctionnaire à l'immigration n'avait pas juridiction pour passer outre aux exigences relatives au visa et, en l'absence d'un visa d'immigrant, il a eu raison d'appliquer ces exigences dans ce cas.

L'article 34(3) de la Partie I du Règlement sur l'immigration suit comme tel:

- "34(3) Nonobstant les dispositions de l'article 28, un requérant se trouvant au Canada qui
- (a) s'il se trouvait hors du Canada, pourrait être désigné pour admission au Canada en tant que parent désigné, et
 - (b) n'est pas en possession d'un visa d'immigrant ou d'une lettre de pré-examen, mais à qui, de l'avis d'un fonctionnaire à l'immigration serait délivré sur demande un visa ou une lettre de pré-examen s'il se trouvait hors du Canada peut être admis au Canada en vue d'y résider en permanence,
 - (c) s'il satisfait aux exigences de la Loi et du présent Règlement;
 - (d) s'il fait une demande selon la forme prescrite par le Ministre avant l'expiration de la période pendant laquelle il a été autorisé à séjourner temporairement au Canada par un fonctionnaire à l'immigration;
 - (e) si une personne qui pourrait le nommer parent désigné fait une demande en vue de son admission, selon la forme prescrite par le Ministre;
 - (f) s'il n'a pas accepté d'emploi au Canada sans l'approbation écrite d'un fonctionnaire du ministère; et
 - (g) si un fonctionnaire à l'immigration est d'avis qu'il aurait été admis au Canada en vue d'y résider en permanence eût-il subi un examen hors du Canada en tant que parent désigné et son admissibilité eût-elle été établie conformément aux normes énoncées à l'Annexe B."

- (1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile and that:
- (3) you are a member of the prohibited class under paragraph (t) of Section 5 of the Immigration Act in that you cannot comply with the requirements of this Act or the Regulations by reason of the fact that:
 - (i) you have taken employment in Canada without the written approval of an officer of the Department as required by paragraph (e) of subsection (3) of Section 34 of the Immigration Regulations, Part I;
 - (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part I;
 - (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I."

No one appeared for the appellant and after hearing the submission by Counsel for the Minister of Manpower and Immigration, the Board gave oral judgment dismissing the appeal.

In the instant case, the Board decided to give written reasons for its disposal of the appeal.

Section 34 deals with the admissibility of persons to Canada. The section sets out the conditions and tests which must be met and complied with by an applicant. If he is successful then an Immigration officer may admit such person for permanent residence notwithstanding Section 28. This is a permissive act on the part of the Immigration officer. There is no mandatory requirement that he shall admit the person concerned. If the person concerned fails to meet the conditions for admissibility then all other requirements of the Immigration Act and Regulations, including Section 28, apply. It follows, therefore, that Petersen not having been able to meet the requirements of subsection (f) of Section 34(3) of the said Regulations could be ordered deported as a result of an Inquiry properly held, as in this case, on the ground that he was not in possession of an immigrant visa as required by Section 28(1) of the Immigration Regulations, Part I.

Avant que ne soient rendues les raisons de la décision de cet appel, les deux points en litige, soit l'absence d'un visa d'immigrant valide et non périmé et d'un certificat médical requis par les articles 28(1) et 29(1) de la Partie I du Règlement sur l'immigration, ont été étudiées dans l'affaire de l'appel de Aubrey Wellesley Jackson, no. 68-5053 aux dossiers de la Commission d'appel de l'immigration, mardi 7 février 1968. L'ordonnance d'expulsion rendue contre M. Jackson est fondée sur les motifs suivants:

"I have reached the decision that you may not come into or remain in Canada as of right in that

(1) you are not a Canadian citizen;

(2) you are not a person having Canadian domicile and that:

(3) you are a member of the prohibited class under paragraph (t) of Section 5 of the Immigration Act in that you cannot comply with the requirements of this Act or the Regulations by reason of the fact that:

- (i) you have taken employment in Canada without the written approval of an officer of the Department as required by paragraph (e) of subsection (3) of Section 34 of the Immigration Regulations, Part I;
- (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of Section 28 of the Immigration Regulations, Part I;
- (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I."

L'appelant n'était pas représenté à l'audition et, après avoir entendu les arguments du conseiller du ministère de la Main-d'oeuvre et de l'Immigration, la Commission a rendu un jugement sur le banc et a rejeté l'appel.

Dans l'instance, la Commission a décidé de donner par écrit les raisons de sa décision de l'appel.

L'article 34 porte sur l'admissibilité au Canada. L'article pose les conditions que doit respecter et les normes auxquelles doit satisfaire le requérant. S'il y réussit, le fonctionnaire à l'immigration peut l'admettre comme résident permanent malgré l'article 28. Cette admission de la part du fonctionnaire à l'immigration est facultative. La Loi ne l'oblige pas à admettre la personne intéressée. Si cette personne ne réussit pas à satisfaire aux conditions d'admission toutes

Section 34(3) of the Immigration Regulations, Part I, commencing with the words "Notwithstanding Section 28, an applicant in Canada who", then goes on to state "may be admitted to Canada for permanent residence if, (f), "in the opinion of an Immigration officer, he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, except with respect to arranged employment".

What is the construction to be placed on the words "Notwithstanding Section 28" as used in Section 34? Can they be said to mean that the requirements of Section 28(1) of the said Regulations have been repealed? "Notwithstanding" is defined in the Shorter Oxford English Dictionary, 3rd edition at page 1341 as "A. prep. 1. Despite, in spite of. 2. Following this, that. B. adv. Nevertheless, still, yet. C. conj. although".

"Repeal" is defined in the same dictionary as "1. trans. To revoke, rescind, annul (a resolution, law, sentence, etc.). b. To recall, withdraw (a privilege, grant, etc.). 2. To withdraw or retract (a statement); to give up, abandon (a thought, feeling, etc.). 3. a. To recall (a person) from exile. b. To call or summon back."

From the above-quoted definitions I think it is clear that the phrase "Notwithstanding Section 28" as it appears in Section 34(3) of the Immigration Regulations, Part I, cannot be construed to mean that the requirements of Section 28(1) have been repealed.

Mr. Brewin argued also that the lack of a medical certificate was not a valid ground to order the deportation of Petersen as he had not been asked or given the opportunity to be examined by a medical officer appointed by the Department at any stage during the Inquiry or before it; that he had no knowledge where or how he should apply and no opportunity was afforded him to get a medical certificate. Mr. Brewin contended that the ordinary principles of law and common sense must apply and a person such as Petersen, cannot be denied some right when he has not been given, by the person who can give him the opportunity, to acquire that which he is said not to acquire that which he is said not to have had. That is an injustice and an absurdity. In support of this portion of his argument, Mr. Brewin referred the Board to the case of *Espaillet - Rodriguez* (1964) S.C.R. 3 which was a case under the former Immigration Regulations in which two grounds were given for deportation: One was not having an immigrant visa and the other was not having a medical certificate. In his dissenting judgment, Mr. Justice Cartwright (as he then was) and who was the only judge to deal with the lack of a medical certificate said at page 18:

"Turning to S. 29 of the Regulations its purpose is similarly to prevent a would-be immigrant setting out for Canada if he falls within classes (a), (b), (c) or (s) of s. 5 of the Act and in so far as it contemplates a medical certificate obtained

les autres exigences de la Loi et du Règlement sur l'immigration y compris l'article 28, s'appliquent. Par conséquent, puisque Petersen ne répondait pas aux exigences de l'alinéa (f) du paragraphe (3) de l'article 34 dudit règlement, il pouvait être expulsé à la suite d'une enquête régulière, comme ce fut le cas, pour le motif qu'il n'était pas en possession d'un visa d'immigrant tel qu'exigé par l'article 28(1) de la Partie I du Règlement sur l'immigration.

L'article 34(3) de la Partie I du Règlement sur l'immigration, qui commence par les mots "Nonobstant les dispositions de l'article 28, un requérant se trouvant au Canada qui", poursuit en disant qu'il "peut être admis au Canada pour y résider en permanence si un fonctionnaire à l'immigration est d'avis qu'il aurait été admis au Canada pour y résider en permanence, eût-il subi un examen hors du Canada à titre d'immigrant indépendant et son admissibilité eût-elle été établie conformément aux normes énoncées à l'Annexe A, sauf en ce qui a trait à un emploi réservé."

Comment faut-il interpréter les mots "Nonobstant les dispositions de l'article 28" dans le contexte de l'article 34? Peut-on se dire que cette expression signifie que les exigences de l'article 28(1) dudit règlement sont annulées? Le mot "notwithstanding" est défini comme suit à la page 1341 de la 3e édition du Shorter Oxford English Dictionary: "A prep. 1. Despite, in spite of. 2. Following this, that. B. adv. Nevertheless, still, yet. C. conj. although".

Le même dictionnaire donne la définition suivante au mot "repeal": trans. To revoke, rescind, annul (a resolution, law, sentence, etc.). b. To recall, withdraw (a privilege, grant, etc.). ". To. withdraw or retract (a statement); to give up, abandon (a thought, feeling, etc.). 3. a. To recall (a person) from exile. b. To call or summon back."

D'après les définitions ci-devant citées je crois qu'il est évident que l'expression "Nonobstant l'article 28" dans le contexte de l'article 34(3) de la Partie I du Règlement sur l'immigration ne peut être interprété dans le sens de l'annulation des exigences de l'article 28(1).

M. Brewin a aussi soutenu que l'absence d'un certificat médical ne constituait pas un motif valable, pour ordonner l'expulsion de Petersen puisque personne ne lui avait demandé de se soumettre à un examen par un médecin du ministère qu'il n'a pas eu l'occasion de le faire ni avant ni pendant l'enquête; il ne savait ni où ni comment formuler sa demande et l'occasion d'obtenir un certificat médical ne lui a pas été fournie. M. Brewin a prétendu qu'il fallait appliquer les principes ordinaires de droit et de sens commun et qu'on ne pouvait refuser un droit à une personne comme Petersen lorsque celui qui pouvait lui en fournir l'occasion ne lui a pas permis d'acquiescer ce qu'on lui reproche de ne pas avoir. Cela est injuste et absurde. Pour appuyer

in the country whence the applicant came it also is, in my opinion, inapplicable to the case of a person who has for some time prior to making application for admission been lawfully present in Canada. This is not to say that the appellant does not have to obtain a medical certificate to establish that he does not fall within any of the classes mentioned. In the case before us there is uncontradicted sworn testimony that the applicant is in perfect health and that he asked to be informed to whom he could submit himself for an examination. To deny him this information and a reasonable time in which to obtain a certificate would, in my opinion, be to deny him the sort of hearing to which under the Act and the common law he was entitled.

The view that the provisions of ss. 28 and 29 of the Regulations deal with preliminary matters is strengthened by the wording of s. 30:

"The passing of any test or medical examination outside of Canada or the issue of a visa, letter of pre-examination or medical certificate as provided for in these Regulations is not conclusive of any matter that is relevant in determining the admissibility of any person to Canada."

For the above reasons it is my opinion that the Special Inquiry Officer erred in his interpretation and application of the Act and of the Regulations and that he should have proceeded to inquire and decide whether the appellant was in fact a member of any prohibited class and should have given the appellant an opportunity to obtain a medical certificate showing that he did not fall within any of the classes (a), (b), (c) and (s) of s. 5 of the Act. It follows from this that the deportation order which he made was not made in accordance with the provisions of the Act."

The other four judges relied upon the fact that the appellant, Espaillat-Rodriguez, did not have an immigrant visa as required by the Regulations and dismissed his appeal. They did not mention or discuss whether the lack of a medical certificate was or was not a valid ground on which to order deportation.

At the Inquiry, Petersen admitted he did not have a medical certificate as required by Section 29(1) of the Immigration Regulations, Part I. Section 34(3) although making specific reference to Section 28 of the said Regulations does not make any reference to Section 29. Nowhere in the evidence at the Inquiry or at the hearing of the appeal was evidence adduced to show the state of Petersen's health or that he had requested a medical examination by a Departmental medical officer. That being so and as the Immigration Regulations, Part I, require every immigrant to have such a medical certificate (Section 29(1)), it follows that he has not complied with the said regulations and therefore the lack of

cette partie de son argument, M. Brewin a renvoyé la Commission à l'affaire Espaillet-Rodriguez (1964) R.C.S. 3, qui tombait sous le régime de l'ancien Règlement sur l'immigration et qui donnait deux motifs d'expulsion: l'absence d'un visa d'immigrant et l'absence d'un certificat médical. Dans son jugement dissident, M. le juge Cartwright (à l'époque), fut le seul à s'arrêter à l'absence d'un certificat médical. Il déclarait, à la page 18:

"Turning to S. 29 of the Regulations its purpose is similarly to prevent a would-be immigrant setting out for Canada if he falls within classes (2), (b), (c) or (s) of S. 5 of the Act and in so far as it contemplates a medical certificate obtained in the country whence the applicant came it also is, in my opinion, inapplicable to the case of a person who has for some time prior to making application for admission been lawfully present in Canada. This is not to say that the appellant does not have to obtain a medical certificate to establish that he does not fall within any of the classes mentioned. In the case before us there is uncontradicted sworn testimony that the applicant is in perfect health and that he asked to be informed to whom he could submit himself for an examination. To deny him this information and a reasonable time in which to obtain a certificate would, in my opinion, be to deny him the sort of hearing to which under the Act and the common law he was entitled.

The view that the provisions of ss. 28 and 29 of the Regulations deal with preliminary matters is strengthened by the wording of s. 30:

"The passing of any test or medical examination outside of Canada or the issue of a visa, letter of pre-examination outside of Canada or the issue of a visa, letter of pre-examination or medical certificate as provided for in these Regulations is not conclusive of any matter that is relevant in determining the admissibility of any person to Canada."

For the above reasons it is my opinion that the Special Inquiry Officer erred in his interpretation and application of the Act and of the Regulations and that he should have proceeded to inquire and decide whether the appellant was in fact a member of any prohibited class and should have given the appellant an opportunity to obtain a medical certificate showing that he did not fall within any of the classes (a), (b), (c) and (s) of S. 5 of the Act. It follows from this that the deportation order which he made was not made in accordance with the provisions of the Act."

Les quatre autres juges se sont appuyés sur le fait que l'appelant, Espaillet-Rodriguez, n'avait pas un visa d'immigrant tel qu'exigé par le

such medical certificate is a valid ground for deportation. It may well be that the Board would have come to a different conclusion on this point if the evidence had shown that Petersen had applied to the appropriate Immigration authorities for a medical examination and such examination had been refused.

Mr. Brewin argued that the assessment of "0" points given to Petersen under the heading of occupational demand by the Immigration officer when he assessed Petersen in accordance with the norms set out in Schedule "A" of the Immigration Regulations, Part I, was wrong. He argued that the Special Inquiry Officer misdirected himself at the Inquiry by considering only the occupational demand for the occupation of a machine operator -- actually the assessment was made on the basis of an apprentice machine operator -- which was not the occupation for which Petersen was qualified. According to Mr. Brewin, the assessment for occupational demand which Petersen should have been given should have been based upon the occupation he would likely follow when he got the opportunity and which occupation, in fact, Petersen did get and is now following. The Regulation, Section 32(2)(c), refers to the fact that if he was outside Canada he should be assessed on the basis of the demand in Canada of the occupation in which he is likely to be employed; it does not say in which he is employed when he first comes to Canada. There is all the difference in the world, Mr. Brewin argued, between taking a temporary occupation and assessing the appellant on that basis and stating there is no demand for him on that basis and therefore he does not get any points for occupational demand. The very crux of the case is whether the assessment for occupational demand is based on the occupation Petersen follows or the occupation he is likely to follow or will follow on a reasonable assessment of the probabilities.

Counsel for the Minister took the position that Petersen was not given any units of assessment for occupational demand because he was not qualified in the occupation he was following at the time of the Inquiry. The job that had been arranged for him was that of a learner or apprentice on a spinning machine and he had no experience or training at this type of work.

There can be no doubt that in accordance with Section 32(2)(c) of the Immigration Regulations, Part I, an independent applicant outside Canada, is to be assessed in respect of the demand in Canada for the occupation in which he is likely to be employed. However, an independent applicant, in Canada, who then comes within the ambit of Section 34(3)(f) of the Regulations is to be assessed "as if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule "A", except with respect to arranged employment". The phrase "except with respect to arranged employment" clearly refers to and must be taken to mean employment of a definite nature in which the applicant is either engaged at the time he completes his application for permanent admission to Canada or satisfies the Immigration officer taking the application that he has, in fact, a definite promise of specific employment. In this case Petersen, in his application for permanent admission stated his employment was to be that of an apprentice machine operator and he was assessed in respect of the

Règlement et ont rejeté l'appel. Ils ne se sont pas arrêtés à la question de savoir si l'absence d'un certificat médical constituait un motif valide pour une ordonnance d'expulsion.

Petersen a admis à l'enquête ne pas posséder le certificat médical requis à l'article 29(1) de la Partie I du Règlement sur l'immigration. L'article 34(3) mentionne spécifiquement l'article 28 du même Règlement mais ne mentionne pas l'article 29. Aucune preuve n'a été administrée à l'enquête ni à l'audition de l'appel quant à l'état de santé de Petersen ou pour démontrer qu'il avait demandé de se soumettre à un examen médical par un médecin du Ministère. Puisqu'il en est ainsi et puisque la Partie I du Règlement sur l'immigration exige que tout immigrant possède un tel certificat médical (article 29(1)), l'appelant ne s'est pas conformé au dit règlement et par conséquent l'absence d'un certificat médical est un motif d'expulsion valide. Il est fort possible que la Commission en serait arrivé à une conclusion différente s'il avait été prouvé que Petersen s'est vu refuser l'examen médical après l'avoir demandé aux autorités de l'immigration compétentes.

M. Brewin a soutenu que le fonctionnaire à l'immigration qui a fait l'appréciation de Petersen conformément aux normes établies à l'Annexe "A" de la Partie I du Règlement sur l'immigration a eu tort de lui attribuer une note de "0" au titre des offres d'emploi. Il a soutenu que l'enquêteur spécial s'est trompé lorsqu'il n'a considéré à l'enquête que les offres d'emploi dans la profession de machiniste (en fait l'appréciation était fondée sur la profession d'apprenti-machiniste) alors que ce n'est pas pour cette profession que M. Petersen était le mieux qualifié. Selon M. Brewin, l'appréciation de M. Petersen au titre des offres d'emploi aurait dû porter sur la profession dans laquelle il allait s'engager à la première occasion.

L'article 32(2)(c) du Règlement porte sur le fait que s'il se trouve à l'extérieur du Canada il doit être apprécié selon les offres d'emploi au Canada dans la profession qu'il entend exercer; l'article ne parle pas de la profession qu'il occupe à son arrivée au Canada. M. Brewin a soutenu qu'on ne pouvait apprécier un requérant en se fondant sur la profession qu'il exerce temporairement puis déclarer que puisqu'il n'y a pas d'offres d'emploi dans cette profession on refuse de lui accorder des points au titre des offres d'emploi. La question en litige est de savoir si l'appréciation au titre des offres d'emploi est fondée sur la profession que Petersen exerce ou sur celle qu'il entend exercer ou qu'il exercera selon toute probabilité.

Le conseiller du Ministre a soutenu que Petersen n'a reçu aucun point d'appréciation au titre des offres d'emploi parce qu'il n'était pas qualifié pour la profession qu'il exerçait au moment de l'enquête. L'emploi qui lui avait été réservé était un emploi d'apprenti-fileur et il n'avait aucune expérience et aucune formation dans ce genre de travail.

occupational demand for such an apprentice machine operator. This assessment, in my opinion, was made correctly and in accordance with Section 34(3)(f) of the Immigration Regulations, Part I. To require an Immigration officer to assess, based on a reasonable assessment of probabilities, an applicant in Canada on the basis of the demand for the occupation which he would be likely to follow, would lead to the kind of situation whereby an applicant might well say he intended to follow some type of employment which, in fact, he had no intention of doing even if qualified to do simply in order to obtain a higher assessment. This would negate and render inoperative the phrase "except with respect to arranged employment" in Section 34(3)(f).

A point which has caused the Board some concern is whether the appellant should have been re-assessed immediately prior to the commencement of the Inquiry owing to the lapse of time between his assessment, on or about November 20, 1967 and the date of the Inquiry on January 8, 1968, having in mind that the Deportation Order speaks from its date of issue, January 8, and is not retroactive. Can it be said the appellant suffered any prejudice by the failure to make such a re-assessment? Such re-assessment by an Immigration officer would have to be made as if the appellant were outside Canada, except for arranged employment (Section 34(3)(f)). In this case the arranged employment at the time of the Inquiry was still the same as that set out in his application for permanent admission, namely that of an apprentice machine operator. It cannot be said therefore that by failing to make such a re-assessment Petersen suffered prejudice. On the other hand, if there had been a change in the arranged employment of the appellant between the time of his original assessment and the start of the Inquiry, and as the Special Inquiry Officer cannot substitute his opinion for that of the assessing officer unless it can be shown that the assessing officer acted upon a wrong principle or that on the evidence the decision was manifestly wrong, which is not the present case, it would seem the proper course to be followed by the Special Inquiry Officer would be to adjourn the Inquiry in order to allow the appellant to, amend his application for permanent admission to show the proposed new employment. A re-assessment could then be made by an Immigration officer and the Inquiry proceed.

Mr. Brewin called three witnesses in addition to the appellant in support of his argument that there exists reasonable grounds for the appellant to believe he will be punished for activities of a political character or will suffer unusual hardship and also that there exist compassionate or humanitarian considerations which in the opinion of the Board would warrant the granting of special relief in accordance with the provisions of Section 15(1)(b)(1) and (ii) of the Immigration Appeal Board Act.

Petersen in his evidence before the Board testified as follows:

Il est évident que selon l'article 32(2)(c) de la Partie I du Règlement sur l'immigration, un requérant indépendant se trouvant à l'extérieur du Canada doit être apprécié en regard des offres d'emploi dans la profession qu'il exercera probablement au Canada. Cependant, un requérant indépendant se trouvant au Canada tombe sous le régime de l'article 34(3)(f) du Règlement et doit recevoir l'appréciation qui lui aurait été donnée "eût-il subi un examen hors du Canada à titre d'immigrant indépendant et son admissibilité eût-elle été établie conformément aux normes énoncées à l'Annexe A, sauf en ce qui a trait à un emploi réservé". La proposition "sauf en ce qui a trait à un emploi réservé" porte nettement ou bien sur l'emploi spécifique exercé par le requérant au moment où il dépose sa demande d'admission permanente au Canada, ou bien sur un emploi spécifique formellement réservé au requérant à la satisfaction du fonctionnaire à l'immigration qui reçoit sa demande. Dans l'instance Petersen a déclaré dans sa demande qu'il allait être employé comme apprenti-machiniste et son appréciation a porté sur les offres d'emploi dans cette profession. A mon avis, cette appréciation est correcte et conforme à l'article 34(3)(b) de la Partie I du Règlement sur l'immigration. En exigeant du fonctionnaire à l'immigration qu'il fonde l'appréciation au titre des offres d'emploi du requérant se trouvant au Canada sur la profession qui, selon une analyse rationnelle des probabilités, a le plus de chance d'attirer le requérant, on permet au requérant de déclarer, en vue d'obtenir une meilleure appréciation, qu'il entend exercer tel genre de profession pour laquelle il est qualifié même si ce n'est pas là sa véritable intention. Une telle façon de procéder annulerait la proposition "sauf en ce qui a trait à un emploi réservé" de l'article 34(3)(f) et la rendrait inapplicable.

La Commission s'est demandée s'il aurait fallu soumettre l'appelant à une nouvelle appréciation juste avant le début de l'enquête, étant donné le temps qui s'est écoulé entre l'appréciation, vers le 20 novembre 1967, et l'enquête, le 8 janvier 1968, puisque l'ordonnance d'expulsion n'a d'effet qu'à partir du moment où elle a été rendue, soit le 8 janvier, et n'est pas rétroactive. Peut-on prétendre que l'appelant a été lésé du fait qu'il n'a pas été soumis à une nouvelle appréciation? Il aurait fallu que le fonctionnaire à l'immigration fasse cette re-appréciation comme si l'appelant se fut trouvé à l'extérieur du Canada excepté en ce qui a trait à l'emploi réservé (article 34(3)(f)). Dans l'instance, l'emploi réservé au moment de l'enquête était le même que celui qui avait été mentionné dans la demande d'admission en permanence, soit celui d'apprenti-machiniste. On ne peut donc pas prétendre que Petersen a été lésé par l'absence d'une telle ré-appréciation. Cependant, si l'emploi réservé à l'appelant avait été modifié entre la première appréciation et l'enquête, et puisque l'enquêteur spécial ne peut substituer son opinion à celle du préposé à l'appréciation à moins qu'il ne soit démontré que le préposé à l'appréciation s'est fondé sur un principe faux ou qu'il en est venu, d'après la preuve, à une décision manifestement erronée, ce qui n'est pas le cas dans l'espèce, la procédure correcte qu'aurait dû suivre l'enquêteur spécial aurait été de remettre l'enquête à plus tard afin de permettre à l'appelant de modifier sa demande d'admission en permanence en vue d'y inscrire le nouvel emploi qu'il avait en vue. Le fonctionnaire à l'immigration aurait alors pu procéder à une nouvelle appréciation avant la réouverture de l'enquête.

"Q. If the deportation order is carried out, can you tell us from your own knowledge of any anticipation you have about punishment.

A. The case has been reported on the South African broadcasting network.

Q. What do you mean "the case"?

A. Practically everything I said in Canada about apartheid and so forth and it has all been reported in the press in Capetown and there is a very good chance I might be imprisoned when I get to South Africa.

Q. I take it you are not an expert in law but I take it you will be punished?

A. That is right.

Q. Could you be a little more explicit in regard to your advancement in your profession as a journalist; would there be restrictions there that might not apply to you in Canada?

A. Careers as a newspaperman in South Africa are very limited because of the apartheid restrictions which are in force. A newspaperman cannot move freely and as a result you can only work for coloured papers which is only a handful and white papers, even though you are a good writer, they would not accept you full-time in their employ because they wouldn't be able to send you on any - well, they have to choose specifically the type of stories you write and you cannot write stories freely because oftentimes you have to attend functions of certain people and they have to leave you aside and send a white because a coloured would not be able to get into that particular place or circle."

Professor Arthur Keppel-Jones, Dean of History, Queen's University, testified that he was born in Capetown, South Africa, that he came to Canada eight and a half years ago and has a special interest in the development of race relations in South Africa. He stated he has kept in touch with the development of conditions in South Africa and that there is evidence that when people have done the sort of thing that the Appellant has done, that is, been abroad and criticized the regime, they are immediately subjected to various kinds of pressure when they come back. Professor Keppel-Jones referred to the well-known case of Alan Peyton who spoke in Toronto against the South African regime and on his return had his passport taken away. The Professor made reference to the provisions of the 180-day detention clause found in the General Law Amendment Act of 1965 which provides for the detention of 180 days, merely on the word of the Minister of Justice. No court can question the order with people so detained being kept in solitary confinement and that this detention is intended not for suspected criminals or persons designed for punishment but for witnesses. Petersen being a journalist "would of course be wide open to this treatment."

M. Brewin a fait comparaître trois témoins en plus de l'appelant lui-même à l'appui de son argument selon lequel il existe des motifs raisonnables de croire que l'appelant sera puni pour des activités de caractère politique ou qu'il aura à subir de graves tribulations et qu'il existe aussi des motifs de pitié ou des considérations d'ordre humanitaire qui de l'avis de la Commission justifieraient l'octroi d'un redressement spécial conformément aux dispositions de l'article 15(1) (b)(i) et (ii) de la Loi sur la Commission d'appel de l'immigration.

Le témoignage de Petersen devant la Commission est le suivant:

"Q. If the deportation order is carried out, can you tell us from your own knowledge of any anticipation you have about punishment.

A. The case has been reported on the South African broadcasting network.

Q. What do you mean "the case"?

A. Practically everything I said in Canada about apartheid and so forth and it has all been reported in the press in Cape-town and there is a very good chance I might be imprisoned when I get to South Africa.

Q. I take it you are not an expert in law but I take it you will be punished?

A. That is right.

Q. Could you be a little more explicit in regard to your advancement in your profession as a journalist; would there be restrictions there that might not apply to you in Canada?

A. Careers as a newspaperman in South Africa are very limited because of the apartheid restrictions which are in force. A newspaperman cannot move freely and as a result you can only work for coloured papers which is only a handful and white papers, even though you are a good writer, they would not accept you full-time in their employ because they wouldn't be able to send you on any-well, they have to choose specifically the type of stories you write and you cannot write stories freely because oftentimes you have to attend functions of certain people and they have to leave you aside and send a white because a coloured would not be able to get into that particular place or circle."

Selon son propre témoignage, le professeur Arthur Keppel-Jones, doyen de la Faculté d'histoire de l'Université Queen's, est originaire de Capetown, Afrique du Sud et il est venu au Canada il y a huit ans et demi. Il s'intéresse particulièrement au développement des relations entre les races en Afrique du Sud. Il a affirmé être au courant du développement des conditions en Afrique du Sud et il a déclaré qu'il y a des preuves à l'effet que les personnes qui font ce qu'a fait l'appelant,

When asked by Mr. Brewin:

- "Q. If I may come on to the other part of this clause "or will suffer unusual hardship". Perhaps you have partially covered that but would you see any reasonable grounds for believing that Petersen might suffer unusual hardship?
- A. Well, I think the hardship that he would certainly suffer would be regarded as very considerable in Canada. It is very difficult for anyone in Canada to picture what is involved. It is the whole structure known under the general title of apartheid which involves segregation and restriction on the ground of race and colour in various respect."

Professor Charles Kishmul George Hahn of the Faculty of Engineering, University of Waterloo, who was born in South Africa and has been in Canada since 1962 read under oath a prepared Statement to the Board. In it he said:

"Under existing South African laws there is no doubt whatsoever in my mind that Petersen's appearance at this inquiry constitutes in the eyes of the South African government an act of nothing less than treason. For a non-white South African to plead for permission to remain in Canada and not be deported on humanitarian grounds simply compounds this treason."

He ended his statement as follows:

"Petersen has a good job, he has relations in Kitchener. His deportation would mean a sentence worse than death. He seeks your permission simply to remain in Canada as a responsible human being and a potential Canadian citizen. An opportunity that will give him, for the first time in his life, a chance to live as a dignified human being."

Mr. John Zaritsky, a news reporter on the Kitchener-Waterloo Record newspaper, gave evidence that there is a great demand for skilled newspapermen in Canada and that newspapers all over the country are looking for such skilled help. He testified further that he knew Petersen's qualifications and that there was no question but that he was liable to establish himself successfully in Canada.

Having heard the evidence the Board has no doubt that reasonable grounds exist for believing that Petersen will be punished for activities of a political character if execution of the deportation order is carried out. That being so, he comes squarely within the provisions of Section 15(1)(b)(1) of the Immigration Appeal Board Act.

It is difficult to determine whether Petersen would suffer "unusual hardship" if he should be returned to his own country. "Unusual" is defined in the Shorter Oxford Dictionary, 3rd edition, page 2316, as "Not often occurring or observed, different from what is usual;

soit partir pour l'étranger et critiquer le régime, sont immédiatement soumis à diverses formes de pression à leur retour. Le professeur Keppel-Jones a rappelé le cas bien connu d'Alan Peyton qui à Toronto avait parlé contre le régime Sud Africain et qui à son retour s'était fait enlever son passeport. Le professeur a mentionné les dispositions de la clause du General Law Amendment Act de 1965 qui permet une détention de 180 jours sur la seule parole du Ministre de la Justice. Une telle ordonnance ne peut être remise en question par aucune Cour et le détenu est gardé en isolation. Cette détention ne vise pas les suspects et ce n'est pas une punition mais elle s'applique aux témoins. Puisque Petersen est journaliste, il serait bien entendu passible d'un tel traitement ("would of course be wide open to this treatment").

A la question de M. Brewin,

"Q. If I may come on to the other part of this clause "or will suffer unusual hardship". Perhaps you have partially covered that but would you see any reasonable grounds for believing that Petersen might suffer unusual hardship?" le professeur Keppel-Jones répondit:

"A. Well, I think the hardship that he would certainly suffer would be regarded as very considerable in Canada. It is very difficult for anyone in Canada to picture what is involved. It is the whole structure known under the general title of apartheid which involves segregation and restriction on the ground of race and colour in various respects."

Le professeur Charles Kishmul George Hahn de la Faculté de génie de l'Université de Waterloo, qui est né en Afrique du Sud et qui demeure au Canada depuis 1962, a lu sous serment devant la Commission une déclaration préparée d'avance qui contenait le passage suivant:

"Under existing South African laws there is no doubt whatsoever in my mind that Petersen's appearance at this inquiry constitutes in the eyes of the South African government an act of nothing less than treason. For a non-white South African to plead for permission to remain in Canada and not be deported on humanitarian grounds simply compounds this treason."

La déclaration se terminait comme suit:

"Petersen has a good job, he has relations in Kitchener. His deportation would mean a sentence worse than death. He seeks your permission simply to remain in Canada as a responsible human being and a potential Canadian citizen. An opportunity that will give him, for the first time in his life, a chance to live as a dignified human being."

out of the common, remarkable, exceptional." It is of course common knowledge and the Board is entitled to take judicial notice of the doctrine of apartheid which prevails in South Africa. This doctrine imposes a mode of life circumscribed by restrictions and regulations on both the black and coloured population in that country in a manner with which most Canadians do not agree. Petersen has already told us in his evidence, to which reference has been made earlier, that in South Africa his opportunity to practise and advance in his chosen profession of journalist is severely restricted. In this, however, he is in no different situation from any other coloured journalist. He would return to a life of limited working opportunities, and would live in an atmosphere of restraint and restriction. However there was no evidence adduced either at the Inquiry or Appeal hearing from which I am able to find that the Appellant will himself suffer unusual hardship, over and above that shared and suffered by all "coloureds" if he should be returned to South Africa.

The Board sympathizes with Petersen in his desire to establish himself in Canada where he can come and go as he pleases and practise his profession, according to his ability, without hindrance and without any restriction based on the fact he is coloured. It considers further that it would not be a humane act to order him returned to his own country where he would have to resume restriction and be liable to punishment for activities of a political character. Therefore the Board finds that Petersen is entitled to the granting of special relief under Section 15(1)(b)(ii) of the Immigration Appeal Board Act.

The evidence of Mr. John Zaritsky together with the letter from Raymond Stanton Publications, Exhibit A-1, at the Appeal hearing, show that he should be able to progress satisfactorily if permitted to remain in Canada.

The Board therefore orders and directs that:

- (a) the appeal be and the same is hereby dismissed;
- (b) the deportation order be stayed pending a review of the said order on the day of April 8, 1968;
- (c) the appellant to report for a medical examination as instructed by the Department of Manpower and Immigration.

The Board requests the Department of Manpower and Immigration to arrange the medical examination of Petersen as soon as possible in accordance with the Immigration Act and Regulations and to report the result of such medical examination to the Board.

Concurred in by: Gérard Legaré and U. Benedetti.

For the appellant: A. Brewin, Q.C.;
For the respondent: T.H. Gill, Esq.

M. John Zaritsky, un reporter au service du journal Kitchener-Waterloo Record a déclaré comme témoignage que les journalistes qualifiés étaient en grande demande au Canada, et que les journaux partout au pays étaient à la recherche d'employés qualifiés dans ce domaine. Il a de plus affirmé connaître les qualifications de Petersen et il s'est dit d'avis que celui-ci serait capable de s'établir avec succès au Canada.

Ayant entendu la preuve, la Commission est convaincue qu'il existe des motifs raisonnables de croire que Petersen sera puni pour des activités de caractère politique si l'ordonnance d'expulsion est exécutée. Puisqu'il en est ainsi, il tombe directement sous le régime des dispositions de l'article 15(1)(b)(i) de la Loi sur la Commission d'appel de l'Immigration.

Il est difficile de savoir si Petersen aurait vraiment à subir de "graves tribulations" si on le renvoyait dans son pays. Le mot "unusual" est défini comme suit au Shorter Oxford Dictionary, 3e édition, p. 2316: "Not often occurring or observed, different from what is usual; out of common, remarkable, exceptional." La doctrine de l'apartheid qui sévit en Afrique du Sud est bien connue et la Commission a droit d'en prendre avis judiciairement. Cette doctrine impose un mode de vie restreint et réglementé à la population blanche et non-blanche de tout le pays, d'une façon qui serait désapprouvée par la plus grande partie de la population canadienne. Petersen nous a déjà dit, au cours du témoignage ci-devant mentionné, qu'il avait très peu de chance d'exercer sa profession et d'y avancer en Afrique du Sud. Sa situation ne serait cependant pas différente de celle des autres journalistes noirs. Il retournerait vivre dans un milieu où les occasions d'emploi sont rares et dans un atmosphère de répression. Il n'y a cependant pas eu de preuve à l'enquête et à l'audition de l'appel qui permette de conclure que l'appelant lui-même serait soumis à de graves tribulations plus graves que celles que partagent tous ceux "de couleur", s'il retournerait en Afrique du Sud.

La Commission comprend que Petersen désire s'établir au Canada où il peut se déplacer en toute liberté et exercer sa profession selon ses talents sans qu'on ne lui impose des obstacles et des restrictions du fait qu'il est noir. Elle estime de plus qu'il serait inhumain d'ordonner son retour dans un pays où il serait obligé de recommencer à vivre au sein d'une population noire dans un atmosphère de répression et où il serait passible d'être puni pour des activités d'un caractère politique. La Commission décide donc que Petersen a droit à l'octroi d'un redressement spécial en vertu de l'article 15(1)(b)(ii) de la Loi sur la Commission d'appel de l'immigration.

La preuve présentée par M. John Zaritsky et la lettre de Raymond Stanton Publications, pièce A-1 à l'audition de l'appel, démontrent qu'il serait capable d'accomplir des progrès satisfaisants si on lui permettait de demeurer au Canada.

La Commission ordonne donc:

- (a) que l'appel soit rejeté;
- (b) que l'ordonnance d'expulsion soit suspendu jusqu'à ce qu'elle soit révisée, le 8 avril 1968;
- (c) que l'appelant se présente à l'examen médical comme le lui demande le ministère de la Main-d'oeuvre et de l'Immigration.

La Commission demande au ministère de l'Immigration de prendre les dispositions pour que Petersen subisse l'examen médical aussitôt que possible conformément à la Loi et au Règlement sur l'immigration et de faire parvenir les résultats de cet examen médical à la Commission.

Ont souscrit: Gérard Legaré et U. Benedetti.

Pour l'appelant: Me A. Brewin, c.r.;
Pour l'intimé: M. T.H. Gill.

3.

Samuel James QUARCINI,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 26, 1968;

File: 67-5040.

Coram: Jean-Paul Geoffroy, Vice-Chairman, A.B. Weselak, F. Glogowski.

Two orders of deportation - Coming into force of the Immigration Appeal Board Act - Validity of second order of deportation - Criminal procedure in a foreign country - Immigration Act: S. 5(d); 19(1)(e)(ix).

Held: In 1961, appellant was ordered deported under Section 5(d) of the Immigration Act having been convicted in New York State for a crime involving moral turpitude. Subsequently, appellant, under an American procedure known as "coram nobis" succeeded in having the conviction annulled. In 1967 the appellant was again deported this time under Section 19(1)(e)(ix) of the Immigration Act. At the hearing of his appeal against this order, expert evidence was given before the Board as to the procedure and results of the "coram nobis". Notwithstanding the fact that the conviction on which the first order was based no longer existed, the Board, created in 1967, had no jurisdiction to review a deportation order made in 1961. Its jurisdiction may be exercised only in respect of the deportation order made after the coming into force of the Immigration Appeal Board Act. This second order was valid, since it was based on the existence of the proper order and the consent of the Minister for re-entry into Canada had not been obtained.

The judgment of the Board was delivered by:

Jean-Paul Geoffroy:

The deportation order reads as follows:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile, and that
- 3) you are a person described in subparagraph (ix) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, having returned to Canada contrary to the provisions of Section 38 of the Immigration Act, in that after a deportation order was issued against you at Niagara Falls, Ontario, on June 8, 1961, your appeal against which was dismissed on June 20, 1961, you returned to Canada without the consent of the Minister."

3.
Samuel James QUARCINI,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 26 mars 1968;
Dossier: 67-5040.

Coram: Jean-Paul Geoffroy, vice-président, A.B. Weselak, F. Glogowski.

Ordonnance d'expulsion avant la mise en vigueur de la Loi sur la Commission d'appel de l'immigration - Procédure criminelle d'un pays étranger - Validité d'une seconde ordonnance d'expulsion. - Loi sur l'immigration: Art. 5(d); 19(1)(e) (ix).

Arrêt: En 1961, une ordonnance d'expulsion fut émise contre l'appellant en vertu de l'article 5(d) parce qu'il avait été trouvé coupable d'un crime impliquant turpitude morale, dans l'Etat de New York. Subséquentement, l'appellant, en vertu d'une procédure américaine connue sous le nom de "coram nobis", réussit à faire annuler sa condamnation. En 1967, l'appellant fut expulsé de nouveau en vertu de l'article 19(1)(e)(ix). Lors de l'audition de l'appel contre cette ordonnance devant la Commission des experts témoignèrent quant à la procédure et aux résultats du "coram nobis". Nonobstant le fait que la condamnation sur laquelle la première ordonnance était fondée n'existait plus, la Commission créée en 1967 n'avait pas le droit de réviser une ordonnance d'expulsion émise en 1961. Sa juridiction peut être exercée seulement en rapport avec l'ordonnance d'expulsion faite après la mise en vigueur de la Loi sur la Commission d'appel de l'immigration. La deuxième ordonnance d'expulsion est valide puisqu'elle est fondée sur l'existence d'une ordonnance antérieure et l'appellant n'a pas obtenu le consentement du Ministre l'autorisant à revenir au Canada.

Le jugement de la Commission fut rendu par:

Jean-Paul Geoffroy:

L'ordonnance d'expulsion se lit comme suit:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
and that
- 3) you are a person described in subparagraph (ix) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, having returned to Canada contrary to the provisions of Section 38 of the Immigration Act, in that after a deportation order was issued against you

The relevant facts are the following:

The appellant is a citizen of the United States, 45 years of age and married. He is a purchasing agent who specializes in the buying of wood for use in the making of quality plywood. He frequently comes to Canada on business matters, specially in southern Ontario where he is well known by certain lumbering firms and provincial officials who have jurisdiction in this field.

On June 8, 1961, Mr. Quarcini was deported from Canada at Niagara Falls, Ontario, on the ground that he had been found guilty of a crime involving moral turpitude. This crime had been committed in Niagara Falls, New York State, in the United States towards the end of December 1940. He was convicted in June 1941. Subsequently, while he was still on parole, he went into the American army and stayed there until the end of the war when he was granted an honourable discharge.

Notwithstanding the existence of a deportation order made against him in 1961 and following the ambiguous ruling he was given on appeal of this order, Mr. Quarcini came to Canada on several occasions.

On November 24, 1967, he was deported again. This second deportation order was based on section 19(1)(e)(ix) and founded on the fact that a deportation order had already been made against him and that he attempted to come into Canada without having previously obtained the consent of the Minister.

At the hearing of the appeal, the Board heard the testimony of Mr. Bernard Sax, a lawyer from Niagara Falls, N.Y., who had represented the appellant in a procedure known in the United States as "coram nobis". The object of this procedure had been to nullify the plea of guilty given by Mr. Quarcini at his trial in June 1941. Having succeeded, it was possible for him to obtain a new trial which nullified Mr. Quarcini's conviction. The testimony given by Mr. Sax was supported by a letter from the secretary of the district attorney for Niagara, N.Y.

The appellant, in submitting this evidence, wants to prove the nullity of the first deportation order on which the second is based. His complaint is that in the past he has never been able to put before the immigration authorities, at the first inquiry in 1961 and at the second inquiry in 1967, the facts described above, which facts could have nullified the first deportation order. He alleges that the present Board, because of its wide jurisdiction, can bring a proper remedy to a false and unjust situation.

The respondent argues that the Board, which came into being on November 13, 1967, lacks jurisdiction to decide on a deportation order made in 1961. Its jurisdiction covers only the deportation order made after the Immigration Appeal Board Act came into effect. Only the deportation order made on November 24, 1967 can be submitted for consideration by the Board. This deportation order is valid since

at Niagara Falls, Ontario, on June 8, 1961, your appeal against which was dismissed on June 20, 1961, you returned to Canada without the consent of the Minister."

Les faits dans cette affaire sont les suivants:

L'appelant est âgé de 45 ans, marié, et citoyen des Etats-Unis. Il est un spécialiste pour l'achat de bois qui doit être utilisé pour la fabrication de contre-plaques de qualité. Dans l'exercice de son commerce il lui arrive fréquemment de venir au Canada, surtout dans le sud de l'Ontario où il est bien connu de certaines entreprises forestières et des représentants de l'Etat provincial qui ont juridiction en ce domaine.

Le 8 juin 1961, monsieur Quarcini fut expulsé du Canada à Niagara Falls, Ontario, pour la raison qu'il avait été condamné pour un crime impliquant turpitude morale. Ce crime aurait été commis à Niagara Falls, Etat de New York, aux Etats-Unis, vers la fin du mois de décembre 1940. Il fut condamné au mois de juin 1941. Par la suite, pendant qu'il était en liberté sur parole, il s'est enrôlé dans l'armée américaine et y demeura jusqu'à la fin de la guerre alors qu'il fût démobilisé honorablement.

En dépit de l'existence de l'ordonnance d'expulsion émise en 1961 et, par suite de la réponse ambigüe qu'on lui fournit quant au résultat de l'appel de cette ordonnance, monsieur Quarcini vint au Canada en maintes occasions.

Le 24 novembre 1967, il fut à nouveau expulsé. Cette dernière ordonnance basée sur l'article 19(1)(e)(ix) est fondée sur le fait qu'une première ordonnance d'expulsion avait déjà été émise contre lui et qu'il tentait de revenir au Canada sans avoir au préalable obtenu le consentement du Ministre.

A l'audition de l'appel, la Commission a entendu comme témoin, Me Bernard Sax, avocat de Niagara Falls, N.Y., qui a représenté l'appelant dans une procédure appelée aux Etats-Unis "coram nobis". L'objet de cette procédure était d'obtenir l'annulation du plaidoyer de culpabilité de monsieur Quarcini lors de son procès du mois de juin, 1941. Ayant obtenu gain de cause, il lui fut possible d'obtenir un nouveau procès au cours duquel l'accusation contre monsieur Quarcini a été rejetée. Le témoignage de Me Sax est corroboré par une lettre du secrétaire du Procureur du comté de Niagara, N.Y.

L'appelant, en soumettant cette preuve, veut faire annuler la première ordonnance d'expulsion qui sert de base à la seconde. Il se plaint de n'avoir jamais pu, dans le passé, faire connaître aux autorités de l'immigration, soit lors de la première enquête en 1961, comme aussi à l'occasion de la seconde enquête en 1967, les faits ci-haut décrits susceptibles d'annuler la première ordonnance d'expulsion. Il allègue

it is founded on the existence of a prior deportation order and on the fact that the appellant has not obtained the consent of the Minister authorizing him to return to Canada.

At the hearing the Board has agreed that it does not have jurisdiction to decide on the validity of the first deportation order for the reasons set out by the respondent. However, in order to exercise equitably its discretion under section 15 of the Immigration Appeal Board Act, it has allowed the appellant to give evidence supporting the claim that the first deportation order was illegal. It seems evident that the fact on which the Special Inquiry Officer founded the deportation order of June 8, 1961, does not exist. It has been well established before the Board that the appellant has succeeded in withdrawing his guilty plea and that a new trial resulted in the accusation against him being withdrawn also. However the Board does not believe it has the power to nullify the order. Consequently it must accept as valid the second deportation order made on November 24, 1967, and it dismisses the appeal.

However, by virtue of the jurisdiction conferred upon it by section 15 (1)(b)(i)(ii), the Board, being convinced that proof was made that the appellant has never been convicted of a crime involving moral turpitude, considers that due to the existence of a deportation order by which the appellant is forbidden to come into Canada, the appellant is submitted to unusual hardship and, for humanitarian considerations, the Board believes it is justified in correcting this situation.

The Board decides to quash the deportation order made against the appellant on November 24, 1967, and directs that the appellant be granted right of entry into Canada as a non-immigrant.

Concurred in by: A.B. Weselak and F. Glogowski.

For the appellant: F.J. Murphy, Barrister and Solicitor;
For the respondent: Mrs. E.M. Thomas, Q.C.

que la présente Commission, à cause des pouvoirs étendus dont elle dispose, est en mesure d'apporter un remède approprié à cette situation fausse et injuste.

Le répondant soutient que la Commission, qui est entrée en exercice le 13 novembre 1967, n'a pas compétence pour décider d'une ordonnance d'expulsion émise en 1961. Sa juridiction est limitée à l'ordonnance d'expulsion émise à la suite de la mise en vigueur de la Loi sur la Commission d'appel de l'immigration. Seule l'ordonnance rendue le 24 novembre 1967 peut être soumise à la considération de la Commission. Cette ordonnance d'expulsion est valide puisqu'elle est fondée sur l'existence d'une ordonnance antérieure et l'appelant n'a pas obtenu le consentement du Ministre l'autorisant à revenir au Canada.

La Commission, au cours de l'audition, a convenu qu'elle n'avait pas juridiction pour décider de la validité de la première ordonnance d'expulsion pour les raisons mises de l'avant par le répondant. Cependant, aux fins de pouvoir exercer équitablement sa discrétion en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration, elle a permis à l'appelant de faire une preuve qui tendait à démontrer l'illégalité de la première ordonnance d'expulsion. Il semble évident que le fait sur lequel s'était basé l'officier spécial pour émettre l'ordonnance d'expulsion du 8 juin 1961, n'existe pas. Il a été bien établi devant la Commission que l'appelant a obtenu le retrait de son plaidoyer de culpabilité, et qu'au cours d'un nouveau procès, l'accusation qui avait été portée contre lui a été rejetée. La Commission, cependant, ne croit pas avoir la compétence requise pour annuler l'ordonnance. En conséquence, elle doit accepter comme valide la deuxième ordonnance d'expulsion du 24 novembre 1967 et rejeter l'appel.

Toutefois, en vertu des pouvoirs qui lui sont conférés par l'article 15(1)(b)(i)(ii), la Commission, étant convaincue que la preuve a été faite que l'appelant n'a jamais été condamné pour un crime impliquant turpitude morale, considère que, par suite de l'existence d'une ordonnance d'expulsion lui interdisant d'entrer au Canada et d'y poursuivre l'exercice d'un commerce légitime, l'appelant souffre de graves tribulations et, pour des raisons humanitaires, elle se croit justifiée de corriger cette situation.

La Commission décide d'annuler l'ordonnance d'expulsion rendue contre l'appelant le 24 novembre 1967, et ordonne qu'il soit accordé à l'appelant le droit d'entrer au Canada comme non-immigrant.

Ont souscrit: A.B. Weselak et F. Glogowski.

Pour l'appelant: Me F.J. Murphy;
Pour l'intimé: Me E.M. Thomas, c.r.

4.

Anastassios GIOULEKAS,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of decision: April 10, 1968;

File: 68-5119.

Coram: Miss J.V. Scott, Chairman, A.B. Weselak, U. Benedetti.

Appellate jurisdiction of the Board - court of Record - creature of Statute - Statute must be strictly construed. - New evidence - Discretionary powers of the Board - permanent resident - assessment by Immigration officer - "In the opinion of ..." - substitution of discretion - Immigration Act: S. 5(t) - Immigration Regulations: S. 34(3)(f); 28(1); 29(1); Schedule "A". 4 - Immigration Appeal Board Act: S. 7; 8; 11; 12; 13; 15.

Held: the appellate jurisdiction of the Board must be found in the statute and the statute must be strictly construed - By statute the Board is a Court of Record - The Board is by statute limited in its discretion and can only consider such factors in arriving at its decision as outlined in the Immigration Appeal Board Act. - In the case of a permanent resident, the factors to be considered will cover a very wide range as the Board may exercise its discretionary powers having regard to all the circumstances of the case. In all other cases the factors to be considered are limited as outlined in the Act. - The Board is empowered to receive and consider new evidence. - "In the opinion of an Immigration Officer": Parliament has by apt words indicated that the exercise of any discretionary powers in reaching an opinion shall lie with the Immigration officer; it has not by apt words indicated that the exercise of the discretion itself shall be subject to judicial review. The crucial question here is in what circumstances and to what extent will this Board review the merits of the exercise of a statutory discretion which is made neither subject to appeal nor limited by express provision of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confined. In the opinion of the Board, considering the evidence before it, the appellant did not show that the Immigration officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. It therefore in the instant case declines to review the assessment and substitute its own opinion for that of the Immigration officer.

The judgment of the Board was delivered by:

A.B. Weselak:

4.

Anastassios GIOUKELAS,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 10 avril 1968;

Dossier: 68-5119.

Coram: Mlle J.V. Scott, président, A.B. Weselak, U. Benedetti.

Compétence d'appel de la Commission - cour d'archives - statutaire - interprétation rigoureuse du statut. - Nouvelle preuve. - Pouvoirs discrétionnaires de la Commission - résident permanent - évaluation par un fonctionnaire à l'immigration - "De l'avis de..." - substitution de la discrétion - Loi sur l'immigration: 5(t); Règlement de l'immigration: 28(1), 29(1), 34(f); Annexe "A": 4; Loi sur la Commission d'appel de l'immigration: 7, 8, 11, 12, 13, 15.

Arrêt: Pour déterminer la compétence d'appel de la Commission il faut recourir à la loi qui a créé la Commission et cette loi doit être interprétée rigoureusement. - La loi fait de la Commission une cour d'archives.- La loi délimite la discrétion de la Commission qui, pour en arriver à un jugement, ne doit considérer que les dispositions statutaires. - Dans le cas d'un résident permanent, la Commission aura grande latitude puisqu'elle peut exercer sa discrétion en tenant compte de toutes les circonstances pertinentes. Dans tous les autres cas, la Commission doit s'en tenir aux dispositions énoncées dans la loi. La Commission a le pouvoir d'accueillir une nouvelle preuve. "De l'avis de": en des termes appropriés, le Parlement a investi le fonctionnaire à l'immigration de tous les pouvoirs discrétionnaires pour en arriver à l'expression d'un avis; mais le Parlement n'a pas dit spécifiquement que l'exercice même de ces pouvoirs discrétionnaires pouvait être sujet d'un examen par les tribunaux. Le problème critique, ici, est de poser en quelles circonstances et dans quelle limite la Commission peut-elle examiner l'exercice de pouvoirs discrétionnaires dont il n'y a pas appel et qui n'est pas expressément limité par la Loi?- Les tribunaux ont constamment maintenu qu'ils ne sauraient substituer leur discrétion à celle dont est investie un autre organisme compétent. Vu la preuve, la Commission est d'avis que l'appelant n'a pas démontré que le fonctionnaire à l'immigration s'était appuyé sur un principe faux ou qu'il en était venu à une conclusion manifestement erronée. Dans cette affaire la Commission décline donc de reviser l'évaluation du fonctionnaire à l'immigration et de substituer sa propre opinion à la sienne.

Le jugement de la Commission fut rendu par:

A.B. Weselak:

The deportation order reads:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile and that;
- 3) you are a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Regulations by reason of the fact that:
 - (i) you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, except with respect to prearranged employment;
 - (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations;
 - (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations."

Counsel for the appellant, on being advised that certain submissions could not be entertained by the Board asked what was the appellate jurisdiction of the Immigration Appeal Board?

The Board is a creature of Statute. Having been created by the passage in Parliament of the Immigration Appeal Board Act, Chap. 90, R.S.C. 1966-67. Sections 7 and 8 of the Act declare:

- "7.(1) The Board is a court of record and shall have an official seal, which shall be judicially noticed.
- (2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record and, without limiting the generality of the foregoing, may
 - (a) issue a summons to any person requiring him to appear at the time and place mentioned therein to testify to all matters within his knowledge relative to a subject matter before the Board and to bring with him and produce any document, book or paper that he has in his possession or under his control relative to such subject matter;

L'ordonnance d'expulsion est la suivante:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile and that,
- 3) you are a member of the prohibited class described under paragraph (t) of Section 5 of the Immigration Act in that you do not comply with the requirements of the Immigration Regulations by reason of the fact that:
 - (i) you would not have been admitted to Canada for permanent residence if you had been examined outside of Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A, as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, except with respect to prearranged employment;
 - (ii) you are not in possession of a valid and subsisting immigrant visa issued to you by a visa officer in accordance with the requirements of subsection (1) of section 28 of the Immigration Regulations;
 - (iii) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations."

Le conseiller de l'appelant ayant été informé que certaines soumissions ne pouvaient pas être reçues par la Commission, a demandé en quoi consistait la juridiction de la Commission en appel.

La Commission a été créée par la Loi; elle doit son existence à l'adoption par le Parlement de la Loi sur la Commission d'appel de l'immigration, S.R.C. 1966-67, ch. 90. Les articles 7 et 8 de la Loi sont les suivants:

- "7.(1) La Commission est une cour d'archives et doit avoir un sceau officiel dont il est judiciairement pris connaissance.
- (2) La Commission a, en ce qui concerne la présence, la prestation de serment et l'interrogatoire des témoins, la production et l'examen des documents, l'exécution de ses ordonnances et autres questions nécessaires ou appropriées à l'exercice régulier de sa compétence, tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archives et, sans limiter la généralité de ce qui précède, peut
 - (a) adresser à toute personne une citation lui enjoignant de comparaître aux temps et lieu y mentionnés pour témoigner sur toutes questions

- (b) administer oaths and examine any person upon oath, affirmation or otherwise; and
 - (c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it.
- (3) The Board may, and at the request of either of the parties to the appeal shall give reasons for its disposition of the appeal."
- "8.(1) The Board may, subject to the approval of the Governor in Council, make rules not inconsistent with this Act governing the activities of the Board and the practice and procedure in relation to appeals to the Board under this Act.
- (2) No rule made pursuant to subsection (1) has effect until it has been published in the Canada Gazette."

In C.N.R. v. Lewis (1930) Ex. C.R. 145, Audette J., stated:

"Statutory provisions giving jurisdiction must be strictly construed and that is especially true when the statute confers jurisdiction upon a tribunal, like the Exchequer Court, of limited authority and statutory origin, and in such a case a jurisdiction cannot be said to be implied. A court must not usurp a jurisdiction with which it is not clearly legally invested; but must keep within the limits of its statutory authority; and should not exercise powers beyond the scope of the Act giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act."

A Court of Record is defined in Dixon v. McKay (1903) 21 M.R. 762, by Richards J., as:

"In Stephen's Commentaries, vol. 3, p. 272, a Court of Record is defined as: 'One whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the records of the Court, and are of such high and supereminent authority that their truth is not to be called in question... For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea or even proof be admitted to the contrary. And, if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no'."

And in Re Winnipeg Charter; In Re Sisters of the Holy Name of Jesus and Mary (1922) 2 W.W.R. 253 as abridged in the Canadian Abridgment, Vol. 14, p. 29, it is stated:

"In the sense at least that the Board of Valuation and Revision constituted under s. 277 of the Winnipeg Charter is a tribunal

- de sa connaissance relativement à l'affaire dont est saisie la Commission et d'apporter et produire tout document, livre ou écrit y relatif qu'elle a en sa possession ou sous son contrôle;
- (b) faire prêter serment et interroger toute personne sous serment, affirmation ou autrement; et
 - (c) au cours d'une audition, recevoir les renseignements supplémentaires qu'elle peut estimer être de bonne source ou dignes de foi et nécessaires pour juger l'affaire dont elle est saisie.
- (3) La Commission peut et doit, à la demande de l'une ou l'autre des parties à l'appel, motiver sa décision quant à l'appel."

- "8.(1) La Commission peut, sous réserve de l'approbation du gouverneur en conseil, établir des règles non incompatibles avec la présente loi en ce qui concerne son activité et la pratique et la procédure relatives aux appels à la Commission prévus par la présente loi.
- (2) Aucune règle établie en conformité du paragraphe (1) n'a d'effet avant d'être publiée dans la Gazette du Canada."

Dans l'affaire C.N.R. c. Lewis (1930) Ex C.R. 145, le juge Audette déclarait:

"Statutory provisions giving jurisdiction must be strictly construed and that is especially true when the statute confers jurisdiction upon a tribunal, like the Exchequer Court, of limited authority and statutory origin, and in such a case a jurisdiction cannot be said to be implied. A Court must not usurp a jurisdiction with which it is not clearly legally invested; but must keep within the limits of its statutory authority; and should not exercise powers beyond the scope of the Act giving it jurisdiction and it cannot assume jurisdiction, unless clearly conferred, in respect of matters of prior origin to the Act."

La définition d'une cour d'archives est donnée dans l'affaire Dixon c. McKay (1903) 21 M.R. 762 par le juge Richards:

"In Stephen's Commentaries, vol. 3, p. 272, a Court of Record is defined as: 'One whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the records of the Court, and are of such high and supereminent authority that their truth is not to be called in question ... For it is a settled rule and maxim that nothing

which must under the provisions of the charter governing its duties keep a record of its proceedings, it is a court of record, and, therefore, all the grounds upon which a decision given by it was reached ought to be found among its records. Per Dysart, J., "The appeals to the Board must be brought upon a certain form of pleadings in writing. The Board is to sit after due and prescribed notice to the public; its sessions must be public; all evidence before it must be given under oath and recorded in writing; witnesses may appear and testify; any member of the Board may administer the oath; unwilling witnesses may be compelled to attend; the assessment roll may be examined but the assessors are required to be present to support the roll if they so desire. If these provisions do not make the Board a Court of Record, then it is hard to conceive that our County Court is a Court of Record."

Other characteristics of a Court of Record are described in Kowanko v. J.H. Tremblay Co., (1920) 1 W.W.R. 481, Canadian Abridgment, Vol. 14, p. 25:

"The Board is not declared to be a Court. It has no seal as is usual in the case of Courts. Its orders are not enforceable until registered in the King's Bench. They are not given by the Act the power of enforcement such as ordinarily exists to compel obedience to a Court order. There is given no power to commit for contempt. The provisions of the Act, taken as a whole, do not contemplate a litigation between parties but rather an adjustment of claims by the Board against a fund. There also exist under the Act what may be called positive attributes which are inconsistent with the idea of the Board being a Court. It is a body corporate and is given the right to bring an action and to take proceedings before magistrates. It is given the power to inspect premises and direct alterations to be made thereon and other powers at variance with those usually exercised by Courts. These and other characteristics apparent on perusal of the Act are in opposition to the contention that this Board is a Court."

The appellate jurisdiction of the Board must be found in the statute and the statute must be strictly construed. In the instant case the jurisdiction is to be found in Sections 11 to 15 inclusive of the Act which read as follows:

- "11. A person against whom an order of deportation has been made under the provisions of the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact.
12. The Minister may appeal to the Board on any ground of appeal that involves a question of law or fact, or mixed law and fact from a decision by a Special Inquiry Officer that a person in respect of whom a hearing has been held is not within a prohibited class or is not subject to deportation.

shall be averred against a record, nor shall any plea or even proof be admitted to the contrary. And, if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no'."

Dans l'affaire Re Winnipeg Charter; In Re Sisters of the Holy Name of Jesus and Mary (1922) 2W.W.R. 253, telle que résumée dans le Canadian Abridgment, vol. 14, p. 29, il est dit que:

"In the sense at least that the Board of Valuation and Revision constituted under s. 277 of the Winnipeg Charter is a tribunal which must under the provisions of the charter governing its duties keep a record of its proceedings, it is a court of record, and, therefore, all the grounds upon which a decision given by it was reached ought to be found among its records. Per Dysart, J., 'The appeals to the Board must be brought upon a certain form of pleadings in writing. The Board is to sit after due and prescribed notice to the public; its sessions must be public; all evidence before it must be given under oath and recorded in writing; witnesses may appear and testify; any member of the Board may administer the oath; unwilling witnesses may be compelled to attend; the assessment roll may be examined but the assessors are required to be present to support the roll if they so desire. If these provisions do not make the Board a Court of Record, then it is hard to conceive that our County Court is a Court of Record.'"

D'autres caractéristiques d'une Cour d'Archives sont données dans l'affaire Kowanko c. J.H. Tremblay Co., (1920) 1 W.W.R. 481, Canadian Abridgement, vol. 14, p. 25:

"The Board is not declared to be a Court. It has no seal as is usual in the case of Courts. Its orders are not enforceable until registered in the King's Bench. They are not given by the Act the power of enforcement such as ordinarily exists to compel obedience to a Court order. There is given no power to commit for contempt. The provisions of the Act, taken as a whole, do not contemplate a litigation between parties but rather an adjustment of claims by the Board against a fund. There also exist under the Act what may be called positive attributes which are inconsistent with the idea of the Board being a Court. It is a body corporate and is given the right to bring an action and to take proceedings before magistrates. It is given the power to inspect premises and direct alterations to be made thereon and other powers at variance with those usually exercised by Courts. These and other characteristics apparent on perusal of the Act are in opposition to the contention that this Board is a Court."

La juridiction de la Commission en appel doit se fonder sur la Loi et la Loi doit être interprétée strictement. Dans l'instance, cette juridiction est décrite aux articles 11 à 15 inclusivement:

13. The Board may order a hearing reopened before the Special Inquiry Officer who presided at the hearing or before some other Special Inquiry Officer for the receiving of any additional evidence or testimony, and the Special Inquiry Officer who presides at the reopened hearing shall file a copy of the minutes of the reopened hearing, together with his assessment of such additional evidence or testimony, with the Board for its consideration in disposing of the appeal.
14. The Board may dispose of an appeal under section 11 or section 12 by:
 - (a) allowing it;
 - (b) dismissing it; or
 - (c) rendering the decision and making the order that the Special Inquiry Officer who presided at the hearing should have rendered and made.
15. (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
 - (a) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case, or
 - (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made.
- (2) Where, pursuant to subsection (1), the Board directs that execution of an order of deportation be stayed, it shall allow the person concerned to come into or remain in Canada under such terms and conditions as it may prescribe and shall review the case from time to time as it considers necessary or advisable.
- (3) The Board may at any time

- "11. Une personne contre qui a été rendue une ordonnance d'expulsion, aux termes des dispositions de la Loi sur l'immigration, peut, en se fondant sur un motif d'appel qui implique une question de droit ou une question de fait ou une question mixte de droit et de fait, interjeter appel à la Commission.
12. Le Ministre, en se fondant sur un motif d'appel qui implique une question de droit ou de fait ou une question mixte de droit et de fait, peut interjeter appel à la Commission d'une décision d'un enquêteur spécial portant qu'une personne à l'égard de qui a été tenue une audition n'est pas dans une catégorie interdite ou n'est pas sujette à l'expulsion.
13. La Commission peut ordonner qu'une audition soit reprise devant l'enquêteur spécial qui a présidé l'audition ou devant tout autre enquêteur spécial pour recueillir quelque déposition ou témoignage supplémentaires, et l'enquêteur spécial qui préside la reprise de l'audition doit produire une copie du compte rendu de la reprise de l'audition ainsi que son appréciation de cette déposition ou de ce témoignage à la Commission pour qu'elle l'examine en statuant sur l'appel.
14. La Commission peut statuer sur un appel prévu à l'article 11 ou à l'article 12,
- (a) en admettant l'appel;
 - (b) en rejetant l'appel; ou
 - (c) en prononçant la décision et en rendant l'ordonnance que l'enquêteur spécial qui a présidé l'audition aurait dû prononcer et rendre.
15. (1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que
- (a) dans le cas d'une personne qui était un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu de toutes les circonstances du cas, ou
 - (b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
 - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou

- (a) amend the terms and conditions prescribed under subsection (2) or impose new terms and conditions; or
 - (b) cancel its direction staying the execution of an order of deportation and direct that the order be executed as soon as practicable.
- (4) Where the execution of an order of deportation
- (a) has been stayed pursuant to paragraph (a) of subsection (1), the Board may at any time thereafter quash the order; or
 - (b) has been stayed pursuant to paragraph (b) of subsection (1), the Board may at any time thereafter quash the order and direct the grant of entry or landing to the person against whom the order was made."

Section 11 provides for an appeal to the Board against an order of deportation on law or fact or mixed law and fact which "has been made under the provisions of the Immigration Act". The Board here is restricted in its inquiry to examining the deportation order, the evidence upon which it is based, whether it was made in accordance with the provisions of the Immigration Act and Rules thereunder. If the evidence is such that will support the order, and the order has been made in accordance with the Act and Rules, then the Board has no alternative but to dismiss the appeal under Section 14. The Board here has no discretionary powers but must base its decision on the evidence and the law which is before it.

Under Section 15 of the Immigration Appeal Board Act, the Board is given certain discretionary powers, which when taken into consideration, it is given the power to "direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made. Where, pursuant to subsection (1), the Board directs that execution of an order of deportation be stayed, it shall allow the person concerned to come into or remain in Canada under such terms and conditions as it may prescribe and shall review the case from time to time as it considers necessary or advisable."

The Board, however, is by statute limited in its discretion and can only consider such factors in arriving at its decision as are outlined in the Act.

In the case of a permanent resident, the matters to be considered will cover a very wide range as the Board may exercise its discretionary powers "having regard to all the circumstances of the case."

In all other cases the matters to be considered by the Board are circumscribed by the Act and are limited to determining whether reasonable grounds exist for believing that if the deportation order is carried out "the person concerned will be punished for activities of a political character or will suffer unusual hardship" and also whether

- (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.

- (2) Lorsque, en conformité du paragraphe (1), la Commission ordonne de surseoir à l'exécution d'une ordonnance d'expulsion, elle doit permettre à la personne intéressée de venir ou de demeurer au Canada aux conditions qu'elle peut prescrire et doit examiner de nouveau l'affaire, à l'occasion, selon qu'elle l'estime nécessaire ou opportun.
- (3) La Commission peut, en tout temps,
 - (a) modifier les conditions prescrites aux termes du paragraphe (2) ou imposer de nouvelles conditions, ou
 - (b) annuler sa décision de surseoir à l'exécution d'une ordonnance d'expulsion et ordonner que l'ordonnance soit exécutée aussitôt que possible.
- (4) Lorsqu'il a été sursis à l'exécution d'une ordonnance d'expulsion
 - (a) en conformité de l'alinéa (a) du paragraphe (1), la Commission peut, en tout temps par la suite, annuler l'ordonnance; ou
 - (b) en conformité de l'alinéa (b) du paragraphe (1), la Commission peut, en tout temps par la suite, annuler l'ordonnance et décréter que le droit d'entrée ou de débarquement soit accordé à la personne contre qui l'ordonnance a été rendue.

L'article 11 prévoit l'appel devant la Commission d'une ordonnance d'expulsion "rendue, aux termes des dispositions de la Loi sur l'immigration", ledit appel devant être fondé sur un motif impliquant une question de droit ou une question de fait ou une question mixte de droit et de fait. La Commission doit limiter son enquête à l'ordonnance d'expulsion, à la preuve sur laquelle elle se fonde et à la question de savoir si elle est conforme aux dispositions de la Loi sur l'immigration et de son Règlement. Si la preuve est telle que l'ordonnance s'en trouve étayée et si l'ordonnance a été rendue conformément à la Loi et au Règlement, la Commission ne peut que rejeter l'appel en vertu de l'article 14. La Commission n'a pas de pouvoirs discrétionnaires et doit fonder sa décision sur la preuve et sur la Loi qu'elle a devant elle.

there exist compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief.

The Supreme Court of Canada on appeal, in considering the material for decision, will not receive new evidence.

In Honan v. Bar of Montreal (1900) 30 S.C.R.1

"Per Girouard J., for the Court: ... it has been the constant jurisprudence of this court not to receive here any new evidence whatever."

In Red Mountain Ry v. Blue (1907) 39 S.C.R. 390

"Per Fitzpatrick, C.J.: The jurisprudence of the court is well settled by a long line of decisions that an appeal to the Supreme Court must be decided solely upon the evidence contained in the case certified to the registrar by the clerk of the court appealed from."

And in Vol. 14, Canadian Abridgment, at p. 346:

"At the beginning of the argument appellants applied to have an affidavit added to the case. Per Ritchie, C.J.: The case has been settled and you cannot now amend it by adding what would be equivalent to new evidence." Confederation Life Assn. v. O'Donnell, (1885) 10 S.C.R. 92.

However, the Board, unlike the Supreme Court of Canada, in the Immigration Appeal Board Act is expressly empowered to receive and consider new evidence. Section 7(c) of the Act provides:

"7.(c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it."

Counsel for the appellant did not directly challenge the validity of the order but the Board finds in submissions by Counsel for the appellant that certain argument could be construed as questioning the validity of the order, and therefore will deal with the order in detail.

As to the first two grounds, the appellant admits on Page 3 of the Minutes of Inquiry that he is a citizen of Greece and not a Canadian citizen. He also admits on Page 3 that he has never been admitted to Canada for permanent residence, it follows therefore that he could not have acquired Canadian domicile.

The third ground in the order, being in a prohibited class described under 5(t) of the Immigration Act, is based on three factors, the first of which is that he would not have been admitted to Canada

L'article 15 de la Loi sur la Commission d'appel de l'immigration accorde à la Commission certains pouvoirs discrétionnaires. Elle peut, entre autre, "ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement. Lorsque, en conformité du paragraphe (1), la Commission ordonne de surseoir à l'exécution d'une ordonnance d'expulsion, elle doit permettre à la personne intéressée de venir ou de demeurer au Canada aux conditions qu'elle peut prescrire et doit examiner de nouveau l'affaire, à l'occasion, selon qu'elle l'estime nécessaire ou opportun."

La discrétion de la Commission est cependant limitée par la Loi et elle ne peut faire entrer en ligne de compte dans sa décision que les facteurs prévus par la Loi.

Dans le cas de résident permanent, les facteurs en question couvrent un grand nombre de situations puisque la Commission a des pouvoirs discrétionnaires "compte tenu de toutes les circonstances du cas."

Dans tous les autres cas, les facteurs dont la Commission doit tenir compte sont précisés par la Loi et ils ne comprennent que les questions de l'existence de motifs raisonnables de croire que si l'ordonnance d'expulsion est exécutée, "la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations" et motifs de pitié et de considérations d'ordre humanitaire qui de l'avis de la Commission justifieraient l'octroi d'un redressement spécial.

La Cour suprême du Canada refuse de recevoir de nouvelles preuves lorsqu'elle décide d'un appel.

Dans l'affaire Honan c. Bar of Montréal (1900) 30 R.C.S.1:

"Per Girouard J., for the Court: ... it has been the constant jurisprudence of this court not to receive here any new evidence whatever."

Dans l'affaire Red Mountain Ry c. Blue 39 R.C.S. 390:

"Per Fitzpatrick C.J.: The jurisprudence of the court is well settled by a long line of decisions that an appeal to the Supreme Court must be decided solely upon the evidence contained in the case certified to the registrar by the clerk of the court appealed from."

Au volume 14 du Canadian Abridgement, p. 346:

"At the beginning of the argument appellants applied to have an affidavit added to the case. Per Ritchie, C.J.,: The case

as a permanent resident, if he had been examined outside of Canada as an independent applicant in accordance with the norms set out in Schedule "A", as required by paragraph (f) of subsection (3) of Section 34 of the Immigration Regulations, except with respect to prearranged employment.

The assessment under Section 34 of the regulations was made by Immigration officer J.F. Dinsmore. The assessment given to the appellant was as follows:

| | |
|---------------------------------|------------------------------|
| (i) Education and training | 9 out of a possible 20 |
| (ii) Personal assessment | 8 out of a possible 15 |
| (iii) Occupational demand | 5 out of a possible 15 |
| (iv) Occupational skill | 3 out of a possible 10 |
| (v) Age | 10 out of a possible 10 |
| (vi) Language assessment | 0 out of a possible 10 |
| (vii) Relative | 5 out of a possible 5 |
| (viii) Employment opportunities | <u>5 out of a possible 5</u> |
| TOTAL | 45 |

Counsel for the appellant argued that the Board has the power to review this assessment and if necessary the power to revise it. The Board is of the opinion that it has not the power to go behind the assessment to determine whether the appellant was properly assessed by the Immigration officer.

In Petersen v. Minister of Manpower and Immigration, Campbell, J.C.A., Vice-Chairman, stated:

"The Special Inquiry Officer cannot substitute his opinion for that of the opinion of the assessing officer unless it can be shown that the assessing officer acted upon a wrong principle or that on the evidence the decision was manifestly wrong."

Section 34 of the Immigration Regulations reads in Part:

"34.(1) In this section 'applicant in Canada, means a person who has been allowed to enter and remain in Canada as a non-immigrant under subsection (1) of section 7 of the Act other than"

The Act then lists classes of persons to whom this section does not apply and then the section goes on to provide "may be admitted to Canada for permanent residence if

(f) in the opinion of an immigration officer he would have been admitted to Canada for permanent residence if he had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule "A" except with respect to arranged employment".

has been settled and you cannot now amend it by adding what would be equivalent to new evidence." Confederation Life Assn. v. O'Donnell, (1885) 10 R.C.S. 92.

Cependant, la Commission, contrairement à ce qui se fait en Cour suprême, a le pouvoir formel de recevoir de nouvelles preuves et d'en tenir compte. L'article 7(c) de la Loi prévoit qu'elle peut :

"7.(c) au cours d'une audition, recevoir les renseignements supplémentaires qu'elle peut estimer être de bonne source ou dignes de foi et nécessaires pour juger l'affaire dont elle est saisie."

Le conseiller de l'appelant n'a pas directement contesté la validité de l'ordonnance mais la Commission estime que certains de ses arguments peuvent être interprétés comme une remise en question de la validité de l'ordonnance et étudiera par conséquent l'ordonnance en détail.

En ce qui concerne le premier des deux motifs, l'appelant avoue, à la page 3 du procès-verbal de l'enquête, qu'il est un citoyen grec et non un citoyen canadien. Il avoue aussi, à la page 3, qu'il n'a jamais été admis au Canada en résidence permanente, et par conséquent, il ne peut avoir acquis de domicile canadien.

Le troisième motif de l'ordonnance, soit l'appartenance à une catégorie interdite en vertu de l'article 5(t) de la Loi sur l'immigration, est fondé sur trois facteurs dont le fait qu'il n'aurait pas été admis en résidence permanente au Canada s'il avait été examiné comme requérant indépendant à l'extérieur du Canada conformément aux normes établies à l'Annexe "A" comme l'exige l'alinéa (f) du paragraphe (3) de l'article 34 du Règlement sur l'immigration, excepté en ce qui a trait à un emploi réservé.

L'appréciation prévue à l'article 34 du Règlement a été faite par le fonctionnaire à l'immigration J.F. Dinsmore. Cette appréciation de l'appelant est la suivante :

| | |
|------------------------------------|------------------|
| (i) Instruction et formation | 9 points sur 20 |
| (ii) Personnalité | 8 points sur 15 |
| (iii) Offres d'emploi (profession) | 5 points sur 15 |
| (iv) Compétence professionnelle | 3 points sur 10 |
| (v) Age | 10 points sur 10 |
| (vi) Connaissance des langues | 0 points sur 10 |
| (vii) Parent | 5 points sur 5 |
| (viii) Offres d'emploi (région) | 5 points sur 5 |

TOTAL

45

Schedule "A" relates to Independent Applicants; paragraph 4 provides:

- "4. An applicant in Canada described in subsection (1) of Section 34, must achieve at least fifty units of assessment on the factors set out in this Schedule other than arranged employment."

The Board notes that the section reads "In the opinion of an Immigration officer". Parliament has by apt words indicated that the exercise of any discretionary powers in reaching an opinion shall lie with the Immigration officer; it has not by apt words indicated that the exercise of the discretion itself shall be subject to judicial views.

The crucial question here is, in what circumstances and to what extent will this Board review the merits of the exercise of a statutory discretion which is made neither subject to appeal nor limited by express provision of the Act? The Courts have repeatedly affirmed their incapacity to substitute their own discretion for that of an authority in which the discretion has been confined. There are many matters which the Courts of Appeal are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful, they often accept the decision of the authority in which the discretion is confined simply because they are themselves ill equipped to weigh the merits of one solution, a practical question as against another.

In Dom. Trust Co. v. N.Y. Life Ins. Co., (1918) 3 W.W.R. 850, a statement of Lord Dunedin quoting Lord Halsbury in Montgomerie & Co. v. Wallace-James (1904) A.C. 73, where Lord Halsbury stated.

"Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court."

And in Ruddy v. Toronto Eastern Ry., 38 O.L.R. 556, Lord Buckmaster stated:

"Upon questions of fact an appeal Court will not interfere with the decision of the judge who has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence - unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

Le conseiller de l'appelant a soutenu que la Commission était compétente pour reviser cette appréciation et la modifier si nécessaire. La Commission estime qu'elle n'est pas compétente pour passer outre à l'appréciation pour en déterminer la régularité.

Dans l'affaire Petersen c. le Ministre de la Main-d'oeuvre et de l'Immigration, le vice-président J.C.A. Campbell déclarait:

"The Special Inquiry Officer cannot substitute his opinion for that of the opinion of the assessing officer unless it can be shown that the assessing officer acted upon a wrong principle or that on the evidence the decision was manifestly wrong."

L'article 34 du Règlement sur l'immigration prévoit, entre autre:

"34.(1) Au présent article 'requérant se trouvant au Canada' désigne une personne qui a obtenu la permission d'entrer et de demeurer au Canada, à titre de non-immigrant, aux termes du paragraphe (1) de l'article 7 de la Loi, sauf."

Le Règlement énumère ensuite les catégories de personnes auxquelles cet article ne s'applique pas puis prévoit qu'un requérant "peut être admis en vue de résider en permanence au Canada

(f) si un fonctionnaire à l'immigration est d'avis qu'il aurait été admis au Canada pour y résider en permanence, eût-il subi un examen hors du Canada à titre d'immigrant indépendant et son admissibilité eût-elle été établie conformément aux normes énoncées à l'Annexe A, sauf en ce qui a trait à un emploi réservé."

L'Annexe "A" a trait aux requérants indépendants; l'alinéa 4 prévoit que:

"4. Un requérant qui se trouve au Canada, selon la définition donnée au paragraphe 1 de l'article 34, doit obtenir au moins cinquante points d'appréciation pour les facteurs énoncés dans la présente Annexe, sans compter le facteur 'emploi réservé'.

La Commission souligne que l'article contient la proposition "si un fonctionnaire à l'immigration est d'avis ...". En insérant ces mots, le Parlement a voulu indiquer que le fonctionnaire à l'immigration, lorsqu'il formule son opinion, exerce un pouvoir discrétionnaire; il n'indique pas que l'exercice de cette discrétion doit être sujet aux opinions de la Cour.

La question décisive ici est de savoir dans quelles circonstances et dans quelle mesure la Commission peut se prononcer sur le bien-fondé de l'exercice d'un pouvoir discrétionnaire reconnu par la Loi alors que

The appellant was not present at the hearing and his counsel did not, in the opinion of the Board, considering the evidence before it, show that the Immigration Officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. It therefore in the instant case declines to review the assessment and substitute its own opinion for that of the Immigration officer.

The Board therefore finds that paragraph (i) of the third ground in the order is valid and legal.

As to paragraph (ii) of the third ground in the order, the Minutes of Inquiry disclose that the appellant at Malton, Ontario, was granted on October 13, 1967, a non-immigrant visa to November 13, 1967, and this had not been extended, therefore this ground in the order is valid.

Paragraph (iii) of the third ground in the order is valid. On page 8 of the Minutes of Inquiry the appellant admitted that his passport did not bear a medical certificate duly signed by a Medical officer.

The Board therefore finds that the grounds in the order are valid grounds for deportation and that the Deportation Order was made in accordance with the provisions of the Immigration Act and Regulations and therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act. Having dismissed the appeal on legal grounds under Section 14 of the Immigration Appeal Board Act, the Board now considers the appeal under Section 15 of the Act.

The appellant was not a landed immigrant, i.e. admitted for permanent residence, and as a result the exercise of the Board's discretion has been limited by Parliament to the considerations set out in Sections 15(b)(i) and 15(b)(ii) which read as follows:

- "15(b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
- (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief."

The only evidence, in the instant case, which the Board can properly consider, is the evidence adduced at the inquiry. As the appellant chose not to be present at the hearing the Board did not receive any further evidence. Submissions by Counsel, unless under oath or if documentary and verified by affidavit or otherwise acceptable as evidence, are not evidence upon which the Board can act. Therefore the Board in this case must rely on the record and the only evidence in the record are the minutes of Inquiry.

la Loi ne contient aucune disposition formelle qui limiterait ce pouvoir ou le soumettrait à l'appel. Les tribunaux ont souvent affirmé qu'ils étaient incapables de substituer leur propre discrétion à celle qui a été attribuée spécifiquement à une autorité. Il existe un grand nombre de questions sur lesquelles les Cours d'appel refusent de se prononcer. Même si c'est une Cour d'appel qui doit décider en dernier ressort ce qui est légal et ce qui ne l'est pas, elle accepte souvent la décision qui relève de la discrétion exclusive d'une autre autorité tout simplement parce qu'il n'est pas de son ressort de choisir entre deux solutions à une question pratique.

Dans l'affaire Dom. Trust C. c. N.Y. Life Ins. Co., (1918) 3 W.W.R. 850, Lord Dunedin citait la déclaration suivante de Lord Halsbury dans l'affaire Montgomerie Co. c. Wallace-Jones (1904) A.C. 73:

"Where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate Court."

Dans l'affaire Ruddy c. Toronto Eastern Ry., 38 O.L.R. 556 Lord Buckmaster déclarait:

"Upon questions of fact an appeal Court will not interfere with the decision of the judge who has seen the witnesses, and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence - unless there is some good and special reason to throw doubt upon the soundness of his conclusions."

L'appelant n'assistait pas à l'audition et la Commission estime, à la lumière de la preuve qui a été faite, que son conseiller n'a pas démontré que le fonctionnaire à l'immigration en est arrivé à une conclusion manifestement erronée ou s'est fondé sur un principe faux. Elle refuse donc de reviser l'appréciation dans l'instance et de substituer sa propre opinion à celle du fonctionnaire à l'immigration.

La Commission maintient donc que l'alinéa 1 du troisième motif d'expulsion est valide et conforme à la Loi.

Quant à l'alinéa (ii) du troisième motif d'expulsion, le procès-verbal de l'enquête révèle que l'appelant a reçu à Malton, Ontario, le 13 octobre 1967, un visa de non-immigrant valide jusqu'au 13 novembre 1967, et ce visa n'a pas été renouvelé. Ce motif de l'ordonnance est donc valide.

The Board has carefully examined this evidence and finds that there is absolutely no evidence to support counsel's for the appellant submission that the appellant will be subject to persecution upon his return to Greece.

The appellant has not said so. He lived under the present regime in Greece for several months, he or his family were not persecuted by them during this time, and there is no evidence to indicate that upon his return he will be persecuted for any reason whatsoever, let alone for activities of a political nature. The appellant does not appear to be a person of such prominence as to be subject to the constant surveillance of the regime.

Neither was any evidence adduced that he would suffer undue hardship were he was to be deported. He and his family have lived under the Greek economy, he is accustomed to it and no undue hardship will follow if he is returned to his native country.

As to compassionate and humanitarian considerations the appellant's family is in Greece, he has no really close relatives here, he has established no roots here, the uprooting of which would cause him great distress, and there is no evidence on the record to support such a consideration.

It is true that economically the appellant may not be as well off in Greece as he may be in Canada but the Board feels that this alone is not sufficient reason to condone circumventing our immigration regulations regarding admission.

In conclusion while Parliament has passed legislation permitting a non-immigrant to apply for permanent residence as "an applicant in Canada" it would appear that it did not intend to permit all non-immigrants to remain as permanent residents in Canada. The immigrants are still subject to the same screening on medical and other grounds and to personal assessment as they are when they apply overseas. It therefore behooves a person seeking admission in this manner to at least inquire at an overseas immigration office to determine whether he is admissible as such.

If weight were given to the basic reason for this appeal, it would in effect, make it possible for every immigrant seeking admission as a visitor to create a basis for immunity to deportation merely by extending the period of stay beyond that usually involved in a visit; without more this does not suffice to support an application for special relief.

The Board therefore is of the opinion that there is not sufficient evidence before it which warrants it to exercise its discretion to grant special relief in this case and directs that the Deportation Order be carried out as soon as practicable.

Concurred in by: Miss J.V. Scott and U. Benedetti.

For appellant: Ralph Cowan, Esq.;

For respondent: J.T. Pasman, Esq.

L'alinéa (iii) du troisième motif de l'ordonnance est valide. A la page 8 du procès-verbal de l'enquête, l'appelant avoue que son passeport ne porte pas de certificat médical dûment signé par un médecin du ministère.

La Commission est donc d'avis que les motifs de l'ordonnance d'expulsion sont valides et que l'ordonnance est conforme aux dispositions de la Loi et du Règlement sur l'immigration et rejette par conséquent l'appel en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration. Ayant rejeté l'appel en loi en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission le considère maintenant en vertu de l'article 15 de la Loi.

L'appelant n'était pas immigrant reçu, il n'avait pas été admis en vue de résider en permanence; par conséquent la discrétion de la Commission est restreinte par le Parlement aux considérations énoncées aux alinéas 15(b)(i) et 15(b)(ii) qui sont les suivants:

- "15.(b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu,
- (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
 - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial."

La seule preuve que la Commission peut convenablement étudier est la preuve présentée à l'enquête. Puisque l'appelant a choisi de ne pas se présenter à l'audition, la Commission ne peut recevoir d'autre preuve. Les arguments du conseiller, à moins qu'ils soient donnés sous serment ou consistent en documents appuyés d'un affidavit ou qu'ils soient autrement en preuve, ne constituent pas une preuve dont la Commission peut tenir compte. Par conséquent, dans l'instance, la Commission doit se fonder sur le dossier et la seule preuve au dossier est le procès-verbal de l'enquête.

La Commission a étudié la preuve attentivement et elle ne trouve rien qui puisse appuyer les arguments du conseiller de l'appelant selon lesquels celui-ci sera persécuté à son retour en Grèce.

L'appelant ne l'a pas affirmé. Il a vécu sous le régime grec actuel pendant plusieurs mois sans que lui ou sa famille ne soient persécutés par le régime et rien n'indique qu'à son retour il sera persécuté pour quelque raison et encore moins pour des activités de caractère politique. L'appelant ne semble pas être une personne assez prestigieuse pour tomber sous la surveillance constante du régime.

Il n'a pas été mis en preuve que l'appelant serait soumis à de graves tribulations s'il était expulsé. Il a vécu avec sa famille sous l'économie grecque et il y est habitué; il ne sera donc pas soumis à de graves tribulations s'il retourne dans son pays d'origine.

En ce qui concerne les motifs de pitié et les considérations d'ordre humanitaire, la famille de l'appelant est en Grèce, il n'a pas de proches parents ici et il n'a pas créé de liens dont la rupture lui serait très difficile; il n'existe pas de preuve au dossier qui étayerait de telles considérations.

Il est vrai qu'au point de vue économique, l'appelant ne sera peut être pas aussi à l'aise en Grèce qu'au Canada, mais la Commission est d'avis que ce seul fait ne constitue pas une raison suffisante pour suspendre l'application de nos règlements sur l'immigration en ce qui a trait à l'admission.

Finalement, quoique le Parlement ait adopté des lois qui permettent à un non-immigrant de demander la résidence permanente comme "requérant se trouvant au Canada", ces lois ne semblent pas avoir pour but de permettre à tous les non-immigrants de résider au Canada en permanence. L'immigrant, se trouvant au Canada doit répondre aux mêmes normes de sélection, médicales ou autres, et doit se soumettre à l'appréciation personnelle, comme l'immigrant qui fait sa demande outremer. Il incombe donc à la personne qui cherche à être admise de cette façon de s'informer auprès d'un fonctionnaire à l'immigration outremer afin de déterminer s'il est admissible.

Si l'on accorde de l'importance au motif fondamental de cet appel, on permet en fait à tout immigrant qui demande l'admission comme visiteur de se prémunir contre l'expulsion simplement en prolongeant son séjour au-delà de la période de séjour de visiteur habituelle; ce motif à lui seul ne suffit pas à étayer une demande de redressement spécial.

La Commission estime donc que la preuve ne suffit pas à justifier l'exercice de sa discrétion quant à l'octroi d'un redressement spécial dans ce cas et elle ordonne que l'ordonnance d'expulsion soit exécutée aussitôt que possible.

Ont souscrit: Mlle J.V. Scott et U. Benedetti.

Pour l'appelant: M. Ralph Cowan;
Pour l'intimé: M. J.T. Pasman.

5.
 Femi Ishola AINA, appellant,
 v.
 The Minister of Manpower and Immigration, respondent.

Date of the decision: May 29, 1968;
 File: 68-5258.

Coram: A.B. Weselak, F. Glogowski, Gérard Legaré.

Non compliance with Section 26 Immigration Act - inquiry held pursuant to an unsigned telex request from the Assistant Director in Ottawa. - Immigration Act: 2(e); - The interpretation Act (1967 R.S.C. Chap. 7) 23(3)(4).

Held:

- 1) judicial notice is taken of the fact that in the Government service the Assistant Director is to act for the Director in his absence or immobility to act;
- 2) the Immigration Act contains no direction as to how and with what formality the Director shall cause an inquiry to be held;
- 3) sufficient evidence has been given to prove the authority of the telex message.

The judgment of the Board was delivered by:

A.B. Weselak:

The order of deportation reads:

- "1) you are not a canadian citizen;
- 2) you are not a person having acquired Canadian domicile; and that
- 3) you are a person described under subparagraph (ii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you have been convicted of an offence under the Criminal Code;
- 4) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

Counsel for the appellant challenged the validity of the order on the ground that the Telex message filed as Exhibit "A" to the Inquiry which reads as follows

5.
Femi Ishola AINA, appellant,
c.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: 1e 29 mai 1968;
Dossier: 68-5258.

Coram: A.B. Weselak, F. Glogowski, Gérard Legaré.

Non observance de l'article 26 de la Loi sur l'immigration - Enquête tenue suite à une requête non signée et communiquée par telex par le directeur-adjoint à Ottawa. - Loi sur l'immigration: 2(e); - Loi d'interprétation (1967 S.R.C. Chap. 7): 23(3)(4).

Arrêt:

- 1) connaissance judiciaire du fait que dans la fonction publique, le directeur-adjoint agit pour le compte du directeur quand celui-ci est absent ou empêché d'agir;
- 2) la Loi sur l'immigration ne prescrit pas comment ni quel formalisme le Directeur doit faire tenir une enquête;
- 3) preuve suffisante a été donnée de qui était l'auteur du message par télex.

Le jugement de la Commission fut rendu par:

A.B. Weselak:

L'ordonnance d'expulsion est la suivante:

- "1) you are not a canadian citizen;
- 2) you are not a person having acquired Canadian domicile; and that
- 3) you are a person described under subparagraph (ii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you have been convicted of an offence under the Criminal Code;
- 4) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

Le procureur de l'appellant a contesté la validité de l'ordonnance sous prétexte que le message au télex, pièce "A" déposée à l'enquête, n'est pas conforme à l'article 26 de la Loi sur l'immigration.

"IMM MTL

MANPR IMM OTT

YOUR M 1-387 TELEX REPORT UNDER SECTION 19(1)(E)(11) AND (VI) OF THE IMMIGRATION ACT CONCERNING FEMI ISHOLA AINA, A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE, WHO HAS BEEN CONVICTED OF AN OFFENCE UNDER THE CRIMINAL CODE AND WHO ENTERED CANADA AS A NON-IMMIGRANT AND REMAINS THEREIN AFTER CEASING TO BE A NON-IMMIGRANT OR TO BE IN THE PARTICULAR CLASS IN WHICH HE WAS ADMITTED AS NON-IMMIGRANT: PURSUANT TO SECTION 26 OF THE IMMIGRATION ACT, I DIRECT THAT AN INQUIRY BE HELD."

was not compliance with Section 26 of the Immigration Act which provides

"26. Subject to any order or direction by the Minister, the Director shall, upon receiving a written report under Section 19 and where he considers that an inquiry is warranted, cause an inquiry to be held concerning the person respecting whom the report was made."

in that firstly it did not bear the signature of the director and that it was not certified as being a true copy of the original and that as a result thereof the Special Inquiry Officer had no jurisdiction to hold the Inquiry.

With regard to the first objection Section 2(e) of the Immigration Act provides:

"2.(e) 'Director' means the Director of the Immigration Branch of the Department of Manpower and Immigration or a person authorized by the Minister to act for the Director."

Section 23, subsections (3) and (4) of the Interpretation Act, Chapter 7 R.S.C. 1967 provides:

- "23.(3) Words directing or empowering any other public officer to do any act or thing, or otherwise applying to him by his name of office, include his successors in the office and his or their deputy.
- (4) Where a power is conferred or a duty imposed on the holder of an office as such, the power may be exercised and the duty shall be performed by the person for the time being charged with the execution of the powers and duties of the office."

Le message en question est le suivant:

"IMM MTL

MANPR IMM OTT

YOUR M 1-387 TELEX REPORT UNDER SECTION 19(1)(E)(11) AND (V1) OF THE IMMIGRATION ACT CONCERNING FEMI ISHOLA AINA, A PERSON OTHER THAN A CANADIAN CITIZEN OR A PERSON WITH CANADIAN DOMICILE, WHO HAS BEEN CONVICTED OF AN OFFENCE UNDER THE CRIMINAL CODE AND WHO ENTERED CANADA AS A NON-IMMIGRANT AND REMAINS THEREIN AFTER CEASING TO BE A NON-IMMIGRANT OR TO BE IN THE PARTICULAR CLASS IN WHICH HE WAS ADMITTED AS NON-IMMIGRANT: PURSUANT TO SECTION 26 OF THE IMMIGRATION ACT, I DIRECT THAT AN INQUIRY BE HELD."

L'article 26 de la Loi stipule que:

"26. Sous réserve de tout ordre ou de toutes instructions du Ministre, le directeur, sur réception d'un rapport écrit prévu par l'article 19 et s'il estime qu'une enquête est justifiée, doit faire tenir une enquête au sujet de la personne visée par le rapport."

Le message au télex serait contraire à cette Loi du fait qu'il ne porte pas la signature du directeur et que sa conformité à l'original n'est pas certifiée; par conséquent, l'enquêteur spécial n'était pas habilité à tenir une enquête.

En ce qui concerne la première objection, l'article 2(e) de la Loi sur l'immigration prévoit que:

"2.(e) "directeur" signifie le directeur de la division de l'immigration, au Ministère de la Main-d'oeuvre et de l'Immigration, ou une personne autorisée par le Ministre à agir pour le directeur."

Les paragraphes (3) et (4) de l'article 23 de la Loi d'interprétation, chapitre 7, S.R.C. 1967, prévoient que:

"23.(3) Les mots qui donnent à tout autre fonctionnaire public l'ordre ou l'autorisation d'accomplir un acte ou une chose ou qui, de quelque autre manière, lui sont applicables en raison de son titre officiel, comprennent ses successeurs à la charge et son ou leur délégué.

(4) Quand il est conféré un pouvoir ou imposé un devoir au titulaire d'un poste en cette qualité, le pouvoir peut être exercé et le devoir doit être accompli par la personne alors chargée de l'exercice des attributions relatives à ce poste."

The Board is prepared to take judicial notice of the fact that in the Government service the Assistant Director is to act for the Director in his absence or immobility to act and considering the sections of the Immigration Act and the Interpretation Act the Board finds that the Assistant Director can "cause an Inquiry to be held" under Section 26 of the Act.

Section 19(1)(e)(ii) of the Immigration Act provides:

- "19.(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning
- (e) any person, other than a Canadian citizen or a person with Canadian domicile, who
 - (ii) has been convicted of an offence under the Criminal Code."

A report under Section 19 was received by the Director and considered in the office of the Director. The telex message hereinbefore quoted was then issued by the Assistant Director J.L. Manion in which he states in part "I direct that an Inquiry be held".

As to the telex not having the signature or initials of the Assistant Director and therefore being "a non-descript scrap of paper" insufficient to vest jurisdiction in the Special Inquiry Officer to hold the Inquiry, the Board notes at the outset that Section 26 of the Immigration Act contains no direction as to how and with what formality the Director shall "cause" an Inquiry to be held.

In Volume 32 Corpus Juris Secundum, Article 706 under the heading "Authentication" it is stated at page 978 et seq.

a. In General

A letter or telegram alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown.

"In accordance with the general rule as to the necessity of showing the execution or authenticity of a writing before it may be admitted in evidence, and the limitations and exemptions thereto, discussed infra 733 et seq., a letter alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown. There must be sufficient proof that the letter was written by the person by whom it purports and is claimed to have been written, or under the authority of the person claimed to have authorized it."

La Commission accepte de prendre connaissance juridique du fait que dans la fonction publique, le directeur-adjoint agit pour le compte du directeur quand celui-ci est absent ou empêché d'agir et, eut égard aux articles de la Loi sur l'immigration et la Loi d'interprétation, la Commission déclare que le directeur-adjoint peut "faire tenir une enquête" en vertu de l'article 26 de la Loi.

L'article 19(1)(e)(ii) de la Loi sur l'immigration prévoit que:

- "19.(1) Lorsqu'il en a connaissance, le greffier ou secrétaire d'une municipalité au Canada, dans laquelle une personne ci-après décrite réside ou peut se trouver, un fonctionnaire à l'immigration ou un constable ou un autre agent de la paix doit envoyer au directeur un rapport écrit, avec des détails complets, concernant
- (e) toute personne, autre qu'un citoyen canadien ou une personne ayant un domicile canadien, qui
 - (ii) a été déclarée coupable d'une infraction visée par le Code criminel."

Un rapport prévu par l'article 19 a été reçu par le directeur et étudié au bureau du directeur. Le message au télex ci-devant cité a été envoyé par le directeur-adjoint J.L. Manion qui y déclare, entre autres choses: "I direct that an Inquiry be held".

Quant à la thèse que du fait que le télex ne portait pas la signature du directeur-adjoint il n'était qu'un "non-descript scrap of paper" et ne pouvait suffire à habileter l'enquêteur spécial à tenir une enquête, la Commission souligne au départ que l'article 26 de la Loi sur l'immigration ne prescrit ni comment ni par quelle formalité le directeur doit "faire tenir une enquête".

Aux pages 978 et suivantes du volume 32 du Corpus Juris Secundum, l'article 706, sous le titre "Authentication" affirme ceci:

a. In General

A letter or telegram alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown.

"In accordance with the general rule as to the necessity of showing the execution or authenticity of a writing before it may be admitted in evidence, and the limitations and exemptions thereto, discussed infra 733 et seq., a letter alleged to have been received from a particular source ordinarily is not admissible until its authenticity and genuineness have been sufficiently shown. There must

"Proof of the genuineness of the signature is sufficient authentication to warrant the admission of the letter. The genuineness of a letter or of the signature thereto may be sufficiently established by proof of the handwriting; but, when this is not possible, other evidence may be resorted to for this purpose. Thus a letter not in the handwriting of the alleged sender, or not shown to be in his handwriting, may itself furnish internal evidence of the source from which it came, as for instance the fact that it relates to matters which are known only to the alleged sender, although it has been said that internal evidence alone is not sufficient authentication."

"A telegram, like a letter, is not admissible in the absence of proof of its authenticity either by proof of the handwriting, where the original message is offered, or by other evidence of its genuineness; and where the admission of the telegram depends on the authority given to the actual sender by another person, such authority must be shown.

If a letter or telegram has been admitted on a promise to show authority of the writer, it should be stricken where such authority is not shown."

"Sufficiency of proof - It is not necessary that it should be proved beyond a reasonable doubt that the letter or telegram is that of the alleged author, but evidence which, if uncontradicted, would satisfy a reasonable mind of that fact is sufficient to authorize the admission of the communication. Whether a sufficient foundation has been laid for the admission of the evidence is a matter addressed to the discretion of the trial court, although the final question of its genuineness, assuming a sufficient foundation has been laid, is for the jury."

and at pages 984 and 985

"In order to render a letter or telegram or a copy thereof admissible against the addressee, it must be shown that it was received by him, or duly sent or delivered for transmission to him through the mails so as to raise the presumption, considered supra 136, that it was received by him, or that in some manner it was brought or came to his attention. Similarly a letter addressed to one other than the party sought to be charged with knowledge of its contents cannot be admitted without sufficient proof that the contents were communicated to him."

In Volume 22 of "The English and Empire Digest", Article 4001, page 372

"Telegraphic messages are admissible evidence. Meeson v. Oliver (1854), 23 L.T.O.S. 271, N.P."

be sufficient proof that the letter was written by the person by whom it purports and is claimed to have been written, or under the authority of the person claimed to have authorized it."

"Proof of the genuineness of the signature is sufficient authentication to warrant the admission of the letter. The genuineness of a letter or of the signature thereto may be sufficiently established by proof of the handwriting; but, when this is not possible, other evidence may be resorted to for this purpose. Thus a letter not in the handwriting of the alleged sender, or not shown to be in his handwriting, may itself furnish internal evidence of the source from which it came, as for instance the fact that it relates to matters which are known only to the alleged sender, although it has been said that internal evidence alone is not sufficient authentication."

"A telegram, like a letter, is not admissible in the absence of proof to its authenticity either by proof of the handwriting, where the original message is offered, or by other evidence of its genuineness; and where the admission of the telegram depends on the authority given to the actual sender by another person, such authority must be shown."

If a letter or telegram has been admitted on a promise to show authority of the writer, it should be stricken where such authority is not shown."

"Sufficiency of proof - It is not necessary that it should be proved beyond a reasonable doubt that the letter or telegram is that of the alleged author, but evidence which, if uncontradicted, would satisfy a reasonable mind of that fact is sufficient to authorize the admission of the communication. Whether a sufficient foundation has been laid for the admission of the evidence is a matter addressed to the discretion of the trial court, although the final question of its genuineness, assuming a sufficient foundation has been laid, is for the jury."

pages 984 et 985:

"In order to render a letter or telegram or a copy thereof admissible against the addressee, it must be shown that it was received by him or duly sent or delivered for transmission to him through the mails so as to raise the presumption, considered supra 136, that it was received by him, or that in some manner it was brought or came to his attention. Similarly a letter addressed to one other than the party sought to be charged with knowledge of its contents cannot be admitted without sufficient proof that the contents were communicated to him."

and in Article 4002

"A telegram will be admitted as evidence, although not signed. Coventry Case, Ince's Case (1869), 20 L.T. 405, 421; 1 O'M. & H. 97, 104."

and in Volume 18 Canadian Abridgment at page 708

"Proof of Telegrams - Statutory Provision for Secondary Evidence.

Per Barry, J., (in a dissenting judgment): The originals of certain cablegrams would be the written messages handed in to the telegraph office at the sending point, and not the written copies delivered to recipients. The originals must be produced from the sending office, or else proof of their destruction given before the copies will be admissible. Phipson on Evidence, 4th ed., 497; Henkel v. Pape, L.R. 6 Ex. 7, 40 L.J. Ex. 15, 8 Mews 1068, referred to. To remedy the inconvenience, which must often arise, of producing the original telegram, the New Brunswick legislature has made special provisions for giving secondary evidence of it, under ss. 35, 36 and 37 of The Evidence Act, C.S.N.B. 1903, c, 127.

Jones v. Burgess, (1914) 43 N.B.R. 126 (C.A.). Varied by Supreme Court of Canada, Mar. 3, 1916 (unreported)."

In this case the Board finds that the telegram was sent by the Assistant Director and related to matters which were only known to the Assistant Director. It was duly sent and delivered by him for transmission and the evidence discloses that it was received by the Special Inquiry Officer in the usual course of events relating to such matters. It was acted upon in good faith as a genuine direction.

Section 7(c) of the Immigration Appeal Board Act provides:

"7.(c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it."

Considering the foregoing authorities and the evidence on record the Board finds that the telex message filed as Exhibit "A" is admissible in evidence and it considers it as credible and trustworthy evidence of the existence of a direction by the Assistant Director, and that it is sufficient to "cause an Inquiry to be held" under Section 26 of the Immigration Act.

The appellant was born in Nigeria on the 12th day of November 1938. His father and one brother are in Nigeria. He arrived in Canada on September 11, 1962 and was granted a non-immigrant student visa, renewable annually. He renewed his visa in 1964 and received a Bachelor

A l'article 4001 du volume 22 du "The English and Empire Digest", p. 372:

"Telegraphic messages are admissible evidence.
Meeson v. Oliver (1854), 23 L.T.O.S. 271, N.P."

et à l'article 4002:

"A telegram will be admitted as evidence, although not signed. Coventry Case, Ince's Case (1869), 20 L.T. 405, 421; 1 O'M. & H. 97, 104."

et au volume 18 du Canadian Abridgement, p. 708:

"Proof of Telegrams - Statutory Provision for Secondary Evidence.

Per Barry, J., (in a dissenting judgment): The original of certain cablegrams would be the written messages handed in to the telegraph office at the sending point, and not the written copies delivered to recipients. The originals must be produced from the sending office, or else proof of their destruction given before the copies will be admissible. Phipson on Evidence, 4th ed., 297; Henkel v. Pape, L.R. 6 Ex. 7, 40 L.J. Ex. 15, 8 Mews 1068, referred to. To remedy the inconvenience, which must often arise, of producing the original telegram, the New Brunswick legislature has made special provisions for giving secondary evidence of it, under ss. 35, 36 and 37 of the Evidence Act, C.S.N.B. 1903, c. 127.

Jones v. Burgess, (1914) 43 N.B.R. 126 (C.A.). Varied by Supreme Court of Canada, Mar. 3 1916 (unreported)."

Dans l'instance, la Commission reconnaît que le télégramme a été envoyé par le directeur-adjoint et portait sur des questions qu'il était le seul à connaître. C'est lui qui l'a dûment envoyé et émis pour qu'il soit transmis et la preuve révèle que l'enquêteur spécial l'a reçu comme cela se produit normalement dans ces occasions. L'enquêteur spécial a agi en conséquence le considérant en toute bonne foi comme une directive véritable.

L'article 7(c) de la Loi sur la Commission d'appel de l'immigration prévoit que la Commission peut:

"7.(c) au cours d'une audition, recevoir les renseignements supplémentaires qu'elle peut estimer nécessaires pour juger l'affaire dont elle est saisie."

of Science degree on October 6, 1966, majoring in Mathematics and Physics. He had applied for extension of his visa in 1965 but the visa was withheld because of his conviction on 8th January 1965 of simple assault for which he received a two-year suspended sentence and which was being investigated by the Immigration authorities. At that time and in 1966 he was told to report after he had finished his examinations. On July 8, 1966 the appellant was interviewed by an Immigration officer and at the end of the interview he states he was left with the impression that he would later receive a letter from the Immigration Department. No such letter was forthcoming and he did not report. Apparently a letter was sent on August 26, 1966 but the appellant denies ever receiving this letter.

The appellant married on June 18th, 1966, an applicant for landing, citizen of Haiti, who had arrived in Canada in the month of June 1965. The appellant's wife has been granted permission to work and has been employed as a teacher in a Catholic school at Montreal at an annual salary of \$5,800.00. There are no children of this marriage.

The appellant is presently furthering his education at McGill University taking a course in Management. He is also employed by Steinbergs, training in Computer Analysis at \$120.00 per week.

Although the appellant denied committing the offence which led to his conviction, he nevertheless pleaded guilty and a record of the conviction is attached to the proceedings of the Inquiry.

The Board therefore finds that the ground in the Deportation Order is valid and that the order is made in accordance with the Immigration Act and Regulations thereunder.

The appeal is therefore dismissed under Section 14 of the Immigration Appeal Board Act.

Having dismissed the appeal under Section 14 of the Immigration Appeal Board Act the Board considered this appeal under Section 15(b) of the Immigration Appeal Board Act which provides.

- "15.(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
- (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or,

Ayant tenu compte des autorités ci-devant citées et de la preuve au dossier, la Commission reconnaît que le message au télex déposé comme pièce "A" est recevable en preuve et le considère comme une preuve exacte et digne de foi de l'existence d'une directive émise par le directeur-adjoint et elle considère que ce document suffit à "faire tenir une enquête" aux termes de l'article 26 de la Loi sur l'immigration.

L'appelant est né au Nigéria le 12 novembre 1938. Son père et l'un de ses frères demeurent au Nigéria. Il est arrivé au Canada le 11 septembre 1962 et il lui a été accordé un visa d'étudiant non-immigrant renouvelable tous les ans. Il a renouvelé son visa en 1964 et il a reçu un baccalauréat en sciences le 16 octobre 1966, avec mentions en mathématiques et en physique. Il avait demandé le renouvellement de son visa en 1965 mais son visa a été retenu parce qu'il avait été trouvé coupable de tentative de voies de fait le 8 janvier 1965 et il avait été condamné à une peine de deux ans avec sursis; cet incident faisait alors l'objet d'une enquête des autorités de l'immigration. A ce moment et en 1966 on lui avait dit de se présenter après ses examens. Le 8 juillet 1966, l'appelant a eu un entretien avec un fonctionnaire à l'immigration et il déclare qu'à la fin de l'entretien il avait l'impression qu'il allait recevoir une lettre du ministère de l'Immigration. N'ayant pas reçu de lettre, il ne s'est pas présenté. Il semble qu'on lui avait envoyé une lettre le 26 août 1966 mais l'appelant affirme n'avoir jamais reçu cette lettre.

Le 18 juin 1966, l'appelant a épousé une citoyenne d'Haiti qui était arrivée au Canada en juin 1965 et qui avait demandé d'être reçue comme immigrante. Elle a reçu la permission de travailler et elle a occupé un poste d'enseignante dans une école catholique de Montréal au salaire annuel de \$5,800.00. Le couple n'a pas d'enfants.

A l'heure actuelle, l'appelant poursuit ses études à l'Université McGill où il suit cours en gestion. Il est aussi à l'emploi de Steinbergs où il reçoit une formation d'analyste des données à \$120.00 par semaine.

Quoique l'appelant ait nié avoir commis l'infraction pour laquelle il a été condamné, il a toutefois plaidé coupable et l'acte de condamnation figure au procès-verbal de l'enquête.

La Commission reconnaît donc la validité du motif de l'ordonnance d'expulsion et la conformité de l'ordonnance à la Loi et au Règlement sur l'immigration.

L'appel est donc rejeté en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration.

Ayant rejeté l'appel en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission a considéré l'appel à la lumière de l'article 15(b) de la même Loi qui prévoit que:

(ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The Board has carefully considered the evidence relating to the offence and conviction under the Criminal Code and has reached the conclusion that the offence was not of such a criminal nature as to preclude it from considering exercising its consideration under Section 15 of the Immigration Appeal Board Act.

There was no evidence produced before the Board that the appellant would be punished for activities of a political nature.

The appellant has been in Canada for a period of six years and his wife for a period of three years. They have made progress and adapted themselves well in this country. They have now established roots here.

At page 4 (evidence taken at the hearing before the Board) the following appears:

"Q. If you are deported, to what country will you return?

A. If deported, number 1, to my country. I do not know if the members are aware of what is going on in Nigeria of which I am completely against this war.

Q. Are the skills that you acquired in Canada skills which you could use in your native country?

A. Yes.

Q. There are facilities for those skills in Nigeria?

A. No, not so much in the field I am now on - computers - there is not."

and at page 5

"Q. If deported, would you be punished for political activities?

A. That I can't say. Right from the beginning of the war I have made my views known to our association that I am against the fighting there, that I thought it should be settled. I am aware of the fact some of our members have communicated these feelings to our Embassy and if returned I may be questioned or have pressure put on me. I have not the freedom of expressing idea the way I really want to.

"15.(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa (c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que

- (b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
 - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
 - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement."

La Commission a étudié attentivement la preuve relative à l'infraction et à la condamnation sous le régime du Code criminel et elle a conclu qu'il ne s'agit pas d'une infraction de nature criminelle qui l'empêcherait de considérer l'exercice de sa discrétion en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration.

Il n'a pas été prouvé à la Commission que l'appelant serait puni pour des activités de caractère politique.

L'appelant a vécu au Canada pendant six ans et sa femme pendant trois ans. Ils ont fait des progrès et se sont bien adaptés à ce pays. Ils sont maintenant enracinés ici.

A la page 4 (preuve reçue à l'audition devant la Commission) on trouve ce qui suit:

"Q. If you are deported, to what country will you return?

A. If deported, number 1, to my country. I do not know if the members are aware of what is going on in Nigeria of which I am completely against this war.

Q. Are the skills that you acquired in Canada skills which you could use in your native country?

A. Yes.

Q. You said that there were not facilities in Nigeria?

A. Not, as you know, in computers. Nigeria has not developed so fast as the Western countries. I think they are going into the second generation.

Q. You could be placed there? Are opportunities there?

A. Not with the training I have here. I may be placed in some job below and not able to make use of the training I had here. Computers are going fast and they have a job for me in the second generation. I wouldn't be ahead.

Q. When planning your studies, did you plan with an effort to return or stay in Canada?

A. Since a year after I came here I decided, in 1963, I would stay here.

Q. Then you planned your school programme?

A. Yes."

The appellant's wife was not included in the deportation order. The Board considering the evidence as a whole is of the opinion that it would be an unusual hardship to deport the appellant to his native country where facilities are not available to utilize the talents and skills he has acquired in Canada. It is true that his readmission could be sponsored by his wife as the appellant would appear to qualify under our selection criteria. Considering all the circumstances the Board believes it would be inhumane to force the appellant to terminate his employment, separate him from his wife and incur the expense involved to return to Canada.

The Board therefore directs that the order be stayed Sine Die with a request to the Immigration Department to complete the processing of the appellant and his wife as immigrants and report the results of such examination to the Board.

Pursuant to this stay and request the Board received on January 31st, 1969, a report from the Immigration Department which reads as follows:

"Re: Appeal of Femi Ishola AINA
IAB file 68-5258.

The Immigration Appeal Board dismissed this appeal and directed that deportation be stayed under certain conditions. It has now been establish that the Appellant(s):

(and wife) has complied with immigrant medical requirements;

- Q. There are facilities for those skills in Nigeria?
 A. No, not so much in the field I am now on - computers - there is not."

page 5:

- "Q. If deported, would you be punished for political activities?
 A. That I can't say. Right from the beginning of the war I have made my views known to our association that I am against the fighting there, that I thought it should be settled. I am aware of the fact some of our members have communicated these feelings to our Embassy and if returned I may be questioned or have pressure put on me. I have not the freedom of expressing idea the way I really want to.
- Q. You said that there were not facilities in Nigeria?
 A. Not, as you know, in computers. Nigeria has not developed so fast as the Western countries. I think they are going into the second generation.
- Q. You could be placed there? Are opportunities there?
 A. Not with the training I have here. I may be placed in some job below and not able to make use of the training I had here. Computers are going fast and they have a job for me in the second generation. I wouldn't be ahead.
- Q. When planning your studies, did you plan with an effort to return or stay in Canada?
 A. Since a year after I came here I decided, in 1963, I would stay here.
- Q. Then you planned your school programme?
 A. Yes."

L'épouse de l'appelant n'est pas incluse dans l'ordonnance d'expulsion. La Commission, étant donné l'ensemble de la preuve, estime que l'appelant serait soumis à de graves tribulations si on le renvoyait à son pays d'origine où il n'aurait pas l'occasion d'utiliser les talents et la formation qu'il a acquis au Canada. Il est vrai que sa réadmission pourrait être parrainée par son épouse puisque l'appelant semble répondre à nos critères de sélection. Etant donné ces circonstances, la Commission croit qu'il serait inhumain d'obliger l'appelant à quitter son emploi, à se séparer de sa femme et à déboursier les frais de son retour au Canada.

La Commission ordonne donc que l'ordonnance soit suspendue indéfiniment et elle demande au ministère de l'Immigration de procéder à la réception de l'appelant et de sa femme comme immigrants et de lui soumettre le résultat de ces examens.

background inquiries have failed to reveal any adverse information;

achieved fifty-nine units of assessment as an Independent Applicant/Nominated Relative;

on the basis of information available, has abided by the conditions laid down by the Board.

The respondent will not make any further submissions in this case.

Yours sincerely,

(Sgd.) D.E. Bandy,
Appeals Officer, Enforcement,
Home Services Branch,
Canada Immigration Division."

On March 5th, 1969 the Board was convened and reviewed this case.

In view of the fact that as a result of the examination requested, both the appellant and his wife were found to be admissible as immigrants (except for the conviction) the Board ordered that the Deportation Order made against the appellant on the 8th day of March A.D. 1968 be quashed and directed the grant of landing. On review the panel consisted of Mr. J.C.A. Campbell, Vice-Chairman and Messrs. A.B. Weselak and F. Glogowski.

Concurred in by: F. Glogowski and Gérard Legaré.

For the appellant: E. Michael Berger, Q.C.;

For the respondent: G.T. Trotman, Barrister and Solicitor.

A la suite de ce sursis et de cette demande, la Commission a reçu, le 31 janvier 1969, le rapport suivant du ministère de l'immigration:

"Re: Appeal of Femi Ishola AINA
IAB file 68-5258.

The Immigration Appeal Board dismissed the appeal and directed that deportation be stayed under certain conditions. It has now been established that the Appellant(s):

(and wife) has complied with immigrant medical requirements;

background inquiries have failed to reveal any adverse information;

achieved fifty-nine units of assessment as an Independent Applicant/Nominated Relative;

on the basis of information available, has abided by the conditions laid down by the Board.

The respondent will not make any further submissions in this case.

Yours sincerely,

(Sgd.) D.E. Bandy,
Appeals Officer, Enforcement,
Home Services Branch,
Canada Immigration Division."

Le 5 mars 1969, la Commission s'est réunie pour la revision de cette affaire.

Etant donné que l'examen demandé a révélé que l'appelant et sa femme étaient admissibles comme immigrants (excepté en ce qui concerne la condamnation) la Commission a ordonné que l'ordonnance d'expulsion rendue contre l'appelant le 8 mars 1968 A.D. soit annulée et qu'il lui soit accordé le droit de débarquement. Le vice-président Campbell, MM. A.B. Weselak et F. Glogowski siégeaient en revision.

Ont souscrit: F. Glogowski et Gérard Legaré.

Pour l'appelant: Me E. Michael Berger, c.r.;
Pour l'intimé: Me G.T. Trotman.

6.

Fung CHAN,
Kam Cheong WU,
Wai Leung FUNG,

appellants,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: June 28, 1968;
File: 68-5105, 68-5106, 68-5107.

Coram: J.V. Scott, Chairman, Gérard Legaré, F. Glogowski.

Jurisdiction of the Board - the Board as a superior court of record -
New evidence - introduced after disposition of the appeal - criteria
for testing of new evidence. - Immigration Appeal Board Act: 7(2)(c);
15(3)(4) - Immigration Appeal Board Rules 17(c) - Quebec Code of Civil
Procedure: 483.

Held: Clearly, where execution of a deportation order has been stayed
by the Board, additional evidence could be received and considered in
respect of the powers given to the Board by subsection (3)(4) of S. 15
of the Immigration Appeal Board Act. However, nothing in S. 15 gives
the Board jurisdiction to receive and consider additional evidence where
a decision has been rendered dismissing an appeal and ordering that the
deportation order be executed as soon as practicable.

Section 17(c) of the Immigration Appeal Board Rules is of no help to an
appellant who is seeking to introduce new evidence after the disposition
of the appeal.

Since the Immigration Appeal Board Act is silent as to the power of the
Board to receive new evidence after an appeal is disposed of, it is ne-
cessary to turn to analogous situations prevailing in respect of other
judicial and quasi-judicial bodies.

The Board, as a superior court of record, sees no reason to depart from
the general rule prevailing in sister courts. It will, therefore, grant
a motion to set aside a final disposition of an appeal and for the receipt
of new evidence after such disposition only where:

1. the party seeking to introduce such evidence proves to the
satisfaction of the Board that he could not have obtained
such evidence by reasonable diligence before the original
hearing of the appeal, and
2. the evidence sought to be so introduced is of such a nature
that, if satisfactorily proved, it would furnish a sufficient
reason for reconsideration of the Board's original disposition
of the appeal.

Motions denied. -

6.

Fung CHAN,
Kam Cheong WU,
Wai Leung FUNG,

requérants,

c.

Le Ministre de la Main-d'oeuvre et de l'immigration,

intimé.

Date de la décision: le 28 juin 1968;

Dossier: 68-5105, 68-5106, 68-5107.

Coram: J.V. Scott, président, Gérard Legaré, F. Glogowski.

Compétence de la Commission - la Commission en tant que cour supérieure d'archives - Nouvelle preuve - présentation après disposition d'un appel. - critères pour apprécier une nouvelle preuve - Loi sur la Commission d'appel de l'immigration: 7(2)(c), 15(3)(4) - Règles de la Commission d'appel de l'immigration: 17(c) - Code de procédure civile du Québec: 483.

Arrêt: Lorsque la Commission a décrété le sursis d'une ordonnance d'expulsion il est bien clair qu'elle peut, en vertu des pouvoirs qui lui sont conférés à l'article 15(3)(4) de la Loi sur la Commission d'appel de l'immigration, accueillir et examiner une preuve nouvelle. Cependant rien dans l'article 15 donne compétence à la Commission pour accueillir et examiner une telle preuve lorsque un jugement a été rendu rejetant un appel et ordonnant l'exécution de l'ordonnance d'expulsion aussitôt que faire se pourra.-

L'article 17(c) des Règles de la Commission d'appel de l'immigration n'est d'aucun secours à l'appelant qui tente de présenter une nouvelle preuve après qu'il eût été disposé de l'appel.

La Loi sur la Commission d'appel de l'immigration étant silencieuse sur la compétence de la Commission à accueillir une nouvelle preuve après disposition d'un appel, il devient nécessaire d'examiner une situation semblable dans d'autres juridictions judiciaires ou quasi-judiciaires.

En tant que cour supérieure d'archives, la Commission ne voit aucune raison de ne pas s'en tenir à la règle généralement suivie par les autres tribunaux de même compétence. La Commission par conséquent ne fera droit à une requête pour écarter la disposition finale d'un appel et pour faire accueillir une nouvelle preuve subséquente à une telle disposition que dans les cas suivants:

1. la partie qui cherche à présenter une telle preuve devra démontrer à la satisfaction de la Commission qu'elle n'a

The Board heard arguments on three Notices of Motion filed in respect of the above applicants, in identical terms, requesting an order:

- "1. Setting aside that portion of an Order dated the 19th day of April, 1968 directing that the Deportation Order be executed as soon as practicable, and,
2. Permitting the applicant to file additional evidence establishing his character and suitability as a citizen of Canada

on the ground that additional evidence as to the character of the applicant and his suitability for Canadian Citizenship had, unknown to Counsel appearing on his behalf, been mailed to Counsel in sufficient time to ensure delivery prior to the hearing of the Appeal but was not so delivered."

The facts preceding the filing of the motions are briefly as follows:

The applicants appealed from deportation orders issued against them and their appeals were heard on April 11, 1968, Mr. McLaughlin appearing on behalf of all three appellants, and Mr. A.F. LePitre on behalf of the respondent, the Minister of Manpower and Immigration. At the hearing of the appeals (at which the appellants were not present) Mr. McLaughlin filed certain affidavit evidence relating generally to the character of the appellants and setting out the opinion of the deponents as to their general suitability for admission to Canada as permanent residents. At the conclusion of the hearing, the Board reserved judgment on these appeals, and after careful consideration, rendered its decision thereon on April 19, 1968, dismissing all three appeals and ordering that the deportation orders in respect of each appellant be executed as soon as practicable. Reasons for judgment were handed down May 1, 1968, and deal in some detail with the legality of the deportation orders, and also in respect of the Board's refusal to exercise the discretionary powers vested in it by Section 15 of the Immigration Appeal Board Act.

On May 3, 1968, the Notices of Motion were filed.

It is clear from the material filed in support of the Motions, that two further affidavits as to the character of the appellants were forwarded several days before the date of the hearing of the appeals by the appellants' counsel in Victoria, B.C. to Mr. McLaughlin, his agent in Ottawa, but through some unexplained delay in postal delivery, did not reach Mr. McLaughlin until April 16, 1968, five days after the hearing of the appeals, although, it must be noted, before the decision thereon was rendered.

At the hearing of the Motions, argument was directed to the jurisdiction of the Board to entertain them. Mr. McLaughlin suggested

pâs pu, tout en ayant exercé une diligence raisonnable, obtenir ladite preuve en temps utile avant l'audition de l'appel;

2. la preuve ainsi recherchée et établie de façon satisfaisante, devra être d'une nature telle qu'elle pourrait justifier la Commission de réviser son jugement rendu après audition de l'appel.

Requête rejetée.

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott:

La Commission a entendu une plaidoirie en faveur de trois requêtes déposées par les demandeurs ci-dessus mentionnés; ces requêtes dans des termes identiques demandent une ordonnance:

"1. Setting aside that portion of an Order dated the 19th day of April, 1968 directing that the Deportation Order be executed as soon as practicable, and,

2. Permitting the applicant to file additional evidence establishing his character and suitability as a citizen of Canada

on the ground that additional evidence as to the character of the applicant and his suitability for Canadian Citizenship had, unknown to Counsel appearing on his behalf, been mailed to Counsel in sufficient time to ensure delivery prior to the hearing of the Appeal but was not so delivered."

Les faits antérieurs au dépôt des requêtes se résument ainsi:

Les demandeurs ont appelé d'une ordonnance d'expulsion rendue contre eux; la Commission a entendu leur appel le 11 avril 1968, M. McLaughlin représentait les trois appelants et M. A.F. LePitre occupait pour l'intimé, le ministre de la Main-d'oeuvre et de l'immigration. A l'audition des appels (auxquels les appelants n'étaient pas présents) M. McLaughlin a déposé une certaine preuve appuyée d'un affidavit qui témoigne des bonnes mœurs des appelants et fait ressortir l'opinion favorable des témoins qui ont attesté que les appelants ont les aptitudes pour être admis au Canada en vue d'y résider d'une façon permanente. Au terme de l'audition, la Commission a différé sa décision mais après un examen minutieux, elle a rendu celle-ci le 19 avril 1968; par cette décision la Commission rejetait les trois appels et ordonnait que l'ordonnance d'expulsion à l'encontre de chaque appelant soit exécutée aussitôt que possible. Les motifs du jugement ont été rendus le 1er mai 1968; ils portent sur

that additional evidence could be accepted by the Board, and its decision reconsidered even after the hearing of the appeals and the disposition thereof, under the powers given to it by Section 15 of the Immigration Appeal Board Act.

Section 15(3) and (4) of the Immigration Appeal Board Act provide:

- 15.(3) The Board may at any time
 - (a) amend the terms and conditions prescribed under subsection (2) or impose new terms and conditions; or
 - (b) cancel its direction staying the execution of an order of deportation and direct that the order be executed as soon as practicable.
- (4) Where the execution of an order of deportation
 - (a) has been stayed pursuant to paragraph (a) of subsection (1), the Board may at any time hereafter quash the order; or
 - (b) has been stayed pursuant to paragraph (b) of subsection (1), the Board may at any time thereafter quash the order and direct the grant of entry or landing to the person against whom the order was made.

Clearly, where execution of a deportation order has been stayed by the Board, additional evidence could be received and considered in respect of the powers given to the Board by these subsections. However, in the Board's opinion, nothing in Section 15 gives the Board power to receive and consider additional evidence where a decision has been rendered dismissing an appeal and ordering that the deportation order be executed as soon as practicable.

Mr. McLaughlin also referred to Section 17(c) of the Immigration Appeal Board Rules, which provides:

"The Board may

- (c) do all other things necessary to provide for the proper disposition of an appeal."

In the Board's view, this rule does not help him, since he was seeking to introduce new evidence after the disposition of the appeal.

Section 7(2)(c) of the Immigration Appeal Board Act is also of interest:

"The Board... may...

la légalité des ordonnances d'expulsion, et aussi sur le fait que la Commission a refusé d'exercer les pouvoirs discrétionnaires accordés à celle-ci par l'article 15 de la Loi sur la Commission d'appel de l'immigration.

Le 3 mai 1968 les avis de requêtes ont été déposés.

D'après les pièces déposées au soutien des requêtes, il est manifeste que plusieurs jours avant la date de l'audition des appels, le conseiller des appelants à Victoria C.B., a envoyé à M. McLaughlin, son agent à Ottawa, deux affidavits à l'égard à la moralité des appelants; mais à cause d'un inexplicable retard dans la distribution du courrier par la poste, M. McLaughlin n'a reçu ceux-ci que le 16 avril 1968, soit cinq jours après l'audition des appels; toutefois, on doit remarquer qu'ils sont arrivés avant que la décision ne soit rendue.

A l'audition des requêtes, le conseiller des demandeurs a présenté un argument relatif à la compétence de la Commission de recevoir les requêtes. M. McLaughlin a soutenu que, même après l'audition de l'appel et les dispositions qui en résultent, l'article 15 de la Loi sur la Commission d'appel de l'immigration donne à la Commission les pouvoirs de reconsidérer sa décision.

L'article 15(3) et (4) de la Loi sur la Commission d'appel de l'immigration stipule que:

- 15.(3) La Commission peut, en tout temps,
 - (a) modifier les conditions prescrites aux termes du paragraphe (2) ou imposer de nouvelles conditions; ou
 - (b) annuler sa décision de surseoir à l'exécution d'une ordonnance d'expulsion et ordonner que l'ordonnance soit exécutée aussitôt que possible.
- (4) Lorsqu'il a été sursis à l'exécution d'une ordonnance d'expulsion
 - (a) en conformité de l'alinéa a) du paragraphe (1), la Commission peut, en tout temps par la suite, annuler l'ordonnance; ou
 - (b) en conformité de l'alinéa b) du paragraphe (1), la Commission peut, en tout temps par la suite, annuler l'ordonnance et décréter que le droit d'entrée ou de débarquement soit accordé à la personne contre qui l'ordonnance a été rendue.

Lorsque la Commission a décrété de surseoir à l'ordonnance d'expulsion il est bien clair qu'elle peut, en vertu des pouvoirs que lui confère l'article 15(3) et (4) de la Loi sur la Commission d'appel de l'immigration, recevoir et examiner une preuve additionnelle. La Commission estime, cependant, qu'en aucune façon l'article 15 ne lui donne le pouvoir de recevoir et de considérer une

- (c) during a hearing receive such additional information as it may consider credible or trustworthy and necessary for dealing with the subject matter before it." (*Italics mine*).

It would appear that the Immigration Appeal Board Act and Rules, in so far as they deal with the point at all, provide only for the receipt of additional evidence before an appeal is disposed of. Since the Act is silent as to the power of the Board to receive new evidence after an appeal is disposed of, it is necessary to turn to analogous situations prevailing in respect of other judicial and quasi-judicial bodies.

Mr. Williams cited the case of *The Queen v. Gartland Steamship Lines*, (1958) Ex Ct. 69. In that case, after judgment had been rendered and entered on the records, a motion was brought for leave to present further argument on law. Cameron J. dismissed the motion, stating that his judgment had been pronounced and validity entered "and that consequently I have now no power to entertain a motion such as the present one in which I am invited to hear further argument on a matter of law which was considered in my judgment."

Mr. Williams further drew the Board's attention to a very interesting article in (1956) C.B.R. 898, entitled "Rehearing in Appellate Courts", by R.E. Dignan and D.W. Louisell. This article discusses in some detail the rule existing in many States of the U.S. permitting appellate courts to rehear argument on appeals already dealt with by them. It would appear that although motions for such rehearing are frequent, they are very seldom granted, and rehearing would seem to be confined to a reargument, or further argument, as to law, rather than to the introduction of new evidence before the appellate tribunal.

Neither the Gartland case, nor the American decisions cited in Messrs Dignan and Louisell's article, are directly relevant to the problem confronting the Board in these motions. Counsel for the applicant is not seeking a rehearing of the appeals, or a further opportunity to argue applicable law; he is asking only that the Board receive and consider evidence which was, by unavoidable accident, unavailable at the hearing, and for reconsideration of that part of the Board's decision made pursuant to Section 15 of the Immigration Appeal Board Act.

The Immigration Appeal Board, though an appellate tribunal, is something of an anomaly, since under its statutory powers it can accept evidence at the hearing of an appeal, and many appeals are almost trials de novo, particularly in respect of the Board's discretionary jurisdiction under Section 15. The nearest analogy to a motion such as the one before us, would appear to be a motion for a new trial. In *Clayton v. Br. Amer. Securities Ltd.* (1935) 1 D.L.R. 432 (B.C.C.A.) it was sought to adduce additional evidence after judgment had been pronounced but before it was entered. The question arose whether, after judgment was pronounced, but before it was entered, additional evidence could be

preuve additionnelle lorsqu'elle a rendu la décision qui rejette un appel et ordonne que l'ordonnance d'expulsion soit exécutée aussitôt que possible.

M. McLaughlin mentionne aussi l'article 17(c) du Règlement sur la Commission d'appel à l'immigration qui stipule:

"La Commission peut

(c) prendre toutes autres mesures nécessaires pour en arriver à une juste décision."

D'après la Commission, cette règle ne vient pas au soutien de son argument puisque l'appelant cherche à introduire une preuve nouvelle après la décision de l'appel rendue par la Commission.

L'article 7(2)(c) de la Loi sur la Commission d'appel de l'immigration intéresse ce point:

(c) au cours d'une audition recevoir les renseignements supplémentaires qu'elle peut estimer être de bonne source ou dignes de foi et nécessaires pour juger l'affaire dont elle est saisie."
(nos soulignés)

Il semblerait que la Loi sur la Commission d'appel et ses Règles, lorsqu'elles envisagent cette question, stipulent qu'on ne peut recevoir une preuve additionnelle qu'avant la disposition de l'appel. Puisque la Loi ne se prononce pas sur la compétence de la Commission à recevoir une nouvelle preuve après la disposition de l'appel, il devient nécessaire d'examiner des situations semblables dans d'autres juridictions judiciaires et quasi-judiciaires.

M. Williams a cité l'affaire the Queen c. Gartland Steamship Lines, (1958) Ex Ct. 69. Dans cette affaire une requête, demandant l'autorisation de s'absenter afin de présenter d'autres arguments légaux, a été présentée après la signification du jugement et inscription dans les registres. Le juge Cameron a rejeté la requête; il a déclaré que son jugement a été prononcé et que son inscription est valide " and that consequently I have now no power to entertain a motion such as the present one in which I am invited to hear further argument on a matter of law which was considered in my judgment."

Par ailleurs, M. Williams a attiré l'attention de la Commission sur un article très intéressant publié en (1956) R.B.C. 898, sous le titre "Rehearing in Appellate Courts", par R.E. Dignan et D.W. Louisell. Cet article traite de la Loi qui prévaut dans beaucoup d'Etats des Etats-Unis et qui permet aux cours d'appel de réentendre des arguments sur des appels dont elles ont déjà été saisies. Bien que ces requêtes de nouvelle audition soient fréquentes, il semblerait qu'elles soient rarement accordées; et la nouvelle audition traite surtout, soit de

adduced. Per M.A. Macdonald, J.A.: "The point has not been squarely decided... It is a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to reestablish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur."

Woodworth v. Gagné (1935) 3 W.W.R. 49 is abridged in 34 Can. Abr. (1st Ed.) 1204, as follows:

"Leave to Adduce Additional Evidence after Hearing - Discretion of Trial Judge.

After evidence had been taken, the trial Judge reserved judgment; but before any reasons for judgment were delivered, defendant applied to have the trial reopened and further evidence taken to show, in contradiction of the testimony for defendant, that a witness called by defendant could not have been present in plaintiff's office at the time a certain document put in evidence had been signed. Held, the rule in Hosking v. Terry, 15 Moo P.C. 493, 15 E.R. 581, 15 Mews 1705, should be applied. It reads: ".....the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself and of his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and secondly, that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment." The Judge, therefore, had no untrammelled discretion in the matter, and under the circumstances, the application should be dismissed. Even if he had that discretion, not being convinced that it was in the interests of justice that the case should be reopened for further evidence, he would also have to dismiss the application, following Clayton v. Br. American Securities Ltd., (supra).

In Vareth v. Sainsbury (1928) S.C.R. 72, Rinfret J. said "On application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that if adduced, it would be practically conclusive."

In Halsbury's Laws of England, (2nd edition) Vol. 19, page 267, the learned author states: (9 566) "An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the Court. It must be

présentation de nouveaux arguments touchant un point de Loi, soit de l'affirmation d'un argument antérieur, plutôt que de l'administration d'une nouvelle preuve devant le tribunal d'appel.

Dans l'article de M. Dignan et M. Louisell ni la cause Gartland, ni les décisions américaines n'intéressent directement le problème des requêtes examinées par la Commission. Le conseiller du demandeur ne cherche pas à obtenir ni nouvelle audition des appels, ni une occasion supplémentaire de discuter de la loi pertinente: il demande simplement que la Commission reçoive et considère une preuve qui, à cause d'un retard imprévisible, n'a pu être présentée à l'audition et il demande que d'après cette preuve la Commission réexamine la partie de la décision rendue en conformité de l'article 15 de la Loi sur la Commission d'appel de l'immigration.

La Commission d'appel de l'immigration, bien que tribunal d'appel, constitue un cas à part; en effet, en vertu de ses pouvoirs statutaires elle peut recevoir une preuve à l'audition de l'appel, par contre beaucoup d'appels sont presque tous des jugements de novo, en particulier pour ce qui touche à la compétence discrétionnaire accordée à la Commission par l'article 15. Le cas le plus analogue à celui qui nous occupe ici semble être celui d'une requête de nouveau jugement. Dans l'affaire Clayton c. Br. Amer. Securities Ltd. (1935) I.D.L.R. 432 (C.A.C.B.) une partie a cherché à administrer une preuve additionnelle après la signification du jugement mais avant son inscription. La question qui s'est posée était la suivante: une preuve additionnelle peut-elle être administrée après la signification du jugement et avant son inscription? Le juge adjoint M.A. Macdonald a déclaré: "The point has not been squarely decided.... It is a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to reestablish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur."

L'affaire Woodworth c. Gagné (1935) 3 W.W.R. 49 dans 34 Can. Abr. (1st Ed.) 1204 est résumée ainsi:

"Leave to Adduce Additional Evidence after Hearing - Discretion of Trial Judge.

After evidence had been taken, the trial Judge reserved judgment; but before any reasons for judgment were delivered, defendant applied to have the trial reopened and further evidence taken to show, in contradiction of the testimony for defendant, that a witness called by defendant could not have been present in plaintiff's office at the time a certain document put in evidence had been signed. Held, the rule in

shown that such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new, and that it would not with reasonable diligence have been discovered before. A mere suspicion of fresh evidence is not sufficient.

567. The action may be commenced without leave, but the defendant may move to stay the proceedings on the ground that they are frivolous and vexatious, and on such application the Court should receive evidence on either side as to whether or not there has been a discovery of new and material evidence since the judgment."

This rule, which prevails in most, if not all, common law jurisdictions, is also set out in article 483 of the Quebec Code of Civil Procedure; "483. Likewise, where there is no other useful recourse against a judgment, the court which rendered it may revoke it at the request of one of the parties, in the following cases:

1. When the procedure prescribed has not been followed and the resulting nullity has not been covered;
2. When the judgment has decided beyond the conclusions, or when it has failed to rule on one of the essential grounds of the suit;
3. When, in the case of a minor or interdicted person, no valid defence has been produced;
4. When judgment has been rendered upon an unauthorized consent or tender subsequently disavowed;
5. When judgment has been rendered upon documents whose falsity has only been discovered afterwards, or following fraud of the adverse party;
6. When, since the judgment, decisive documents have been discovered whose production had been prevented by a circumstance of irresistible force or because of the act of the adverse party;
7. When, since the judgment, new evidence has been discovered and it appears that:
 - a. if it had been brought forward in time, the decision would probably have been different;
 - b. it was known neither to the party nor to his attorney or agent and
 - c. it could not, with all reasonable diligence, have been discovered in time

Hosking v. Terry, 15 Moo P.C. 493, 15 E.R. 581, 15 Mews 1705, should be applied. It reads: "..... the party who applies for permission to file a bill of review, on the ground of having discovered new evidence, must show that the matter so discovered has come to the knowledge of himself and of his agents for the first time since the period at which he could have made use of it in the suit, and that it could not, with reasonable diligence, have been discovered sooner; and secondly, that it is of such a character that, if it had been brought forward in the suit, it might probably have altered the judgment."

Le juge a donc entière discrétion en la matière et dans les circonstances la demande devrait être rejetée. En dépit de cette discrétion, puisqu'il n'était pas convaincu que la réouverture du dossier, afin de présenter une preuve supplémentaire, servait les intérêts de la justice il aurait dû rejeter la demande (suivant en cela la décision de la cause Clayton c. Br. American Securities Ltd., supra).

Dans l'affaire Vareth c. Sainsbury (1928) R.C.S. 72, le juge Rinfret a déclaré: "On application for a new trial on the ground that new evidence has been discovered since the trial, we take the rule to be well established that a new trial should be ordered only where the new evidence proposed to be adduced could not have been obtained by reasonable diligence before the trial and the new evidence is such that if adduced, it would be practically conclusive."

Halsbury dans Laws of England (2nd edition) Vol. 19 déclare à la page 267: (9 566) "An action will lie to rescind a judgment on the ground of the discovery of new evidence which would have had a material effect upon the decision of the Court. It must be shown that such evidence is a discovery of something material in the sense that it would be a reason for setting aside the judgment if it were established by proof; that the discovery is new, and that it would not with reasonable diligence have been discovered before. A mere suspicion of fresh evidence is not sufficient."

567. The action may be commenced without leave, but the defendant may move to stay the proceedings on the ground that they are frivolous and vexatious, and on such application the Court should receive evidence on either side as to whether or not there has been a discovery of new and material evidence since the judgment."

Cette règle qui a cours dans presque, sinon toutes, les juridictions de droit commun est aussi mentionnée à l'article 483 du Code de procédure civile; "483. De même le jugement contre lequel n'est ouvert aucun autre recours utile peut être rétracté par le tribunal qui l'a rendu, à la demande d'une partie, dans les cas suivants:

1. Lorsque la procédure prescrite n'a pas été suivie et que la nullité qui en résulte n'a pas été couverte;

This will appear to be derived from the doctrine of estoppel by Res judicata. Osborne's Concise Law Dictionary, 5th Edition states "Res judicata presupposes that there are two opposing parties, that there is a definite issue between them, that there is a tribunal competent to decide the issue, and that within its competence, the tribunal has done so. Once a matter or issue between parties has been litigated and decided, it cannot be raised again between the same parties...."

In McIntosh v. Parent, 55 O.L.R. 552, Middleton J.A. said: "two totally distinct ideas are often confounded in speaking of res judicata. When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be retried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question or fact, once determined, must as between them, be taken to be conclusively established so long as the judgment remains... The other doctrine is often discussed under the maxim nemo debet bis vexari, or as merger by judgment, or splitting of a cause of action, and makes it obligatory upon a plaintiff asserting a cause of action to claim all his relief in respect thereto, and prevents any second attempt to invoke the aid of the Courts for the same cause, for on his first recovery his entire cause of action has become merged in his judgment and is gone for ever. There is no qualification of the general principle where the cause of action is one and the same."

In Maynard v. Maynard, (1951) S.C.R. 345 Cartwright J. (as he then was) quotes with approval the statement of law by Wigram V.C. in Henderson v. Henderson 3 Hare 100, as follows: "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time." This passage has recently been approved by the Privy Council in the case of Hoystead v. Commissioner of Taxation (1926) A.C. 155, at 170.

The learned judge then continues "In the judgment of the Judicial Committee in Hoystead v. Commissioner of Taxation (supra), at page 165, is the following: Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

2. Lorsqu'il a été prononcé au-delà des conclusions, ou qu'il a été omis de statuer sur un des chefs de la demande;
3. Lorsque, s'agissant d'un mineur ou d'un interdit, aucune défense valable n'a été produite;
4. Lorsqu'il a été statué sur la foi d'un consentement ou à la suite d'offres non autorisées et subséquemment désavouées;
5. Lorsque le jugement a été rendu sur des pièces dont la fausseté n'a été découverte que depuis, ou à la suite du dol de la partie adverse;
6. Lorsque, depuis le jugement, il a été découvert des pièces dont la production avait été empêchée par une circonstance de force majeure ou le fait de la partie adverse;
7. Lorsque, depuis le jugement, il a été découvert une preuve et qu'il appert:
 - a. que si elle avait été apportée à temps la décision eût probablement été différente;
 - b. qu'elle n'était connue ni de la partie, ni de son procureur ou agent et
 - c. qu'elle ne pouvait pas, avec toute la diligence raisonnable, être découverte en temps utile.

Ceci semble découler du principe de fin de non-recevoir pour cause de chose jugée (estoppel by Res judicata). Osborne's Concise Law Dictionary, 5ième édition déclare "Res Judicata presupposes that there are two opposing parties, that there is a definite issue between them, that there is a tribunal competent to decide the issue, and that within its competence, the tribunal has done so. Once a matter or issue between parties has been litigated and decided, it cannot be raised again between the same parties...."

Dans l'affaire McIntosh c. Parent, 55 O.L.R. 552 le juge Middleton a déclaré: "two totally distinct ideas are often confounded in speaking of res judicata. When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be retired in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question or fact, once determined, must as between them, be taken to be conclusively established so long as the judgment remains... The other doctrine is often discussed under the maxim nemo debet bis vexari, or as merger by judgment, or splitting of a cause of action, and makes it obligatory upon a

If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

In my opinion the law is correctly stated in Halsbury's Laws of England (2nd Edition) Volume 13 at page 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact".

The Board, as a superior court of record, sees no reason to depart from the general rules prevailing in sister courts. It will, therefore, grant a motion to set aside a final disposition of an appeal, and for the receipt of new evidence after such disposition only where

1. the party seeking to introduce such evidence proves to the satisfaction of the Board that he could not have obtained such evidence by reasonable diligence before the original hearing of the appeal, and
2. the evidence sought to be so introduced is of such a nature that, if satisfactorily proved, it would furnish a sufficient reason for reconsideration of the Board's original disposition of the appeal.

Applying this test to the motions before us, can it be said that the new evidence sought to be introduced, i.e. the affidavits of Paul K.W. Chan and Jack Quan, is of such a vital and material nature as substantially to change the nature of the appeals so as to furnish a sufficient reason for reconsideration of its original disposition thereof?

The answer, in the Board's opinion, is in the negative. It is true that the two affidavits sought to be introduced by the applicants are "new" evidence in the sense that counsel appearing at the hearing of the appeals could not by reasonable diligence have been aware of it at the time, but in no sense do these affidavits introduce any new element which would furnish a sufficient reason for reconsideration of the Board's original disposition of the appeal. These affidavits raise no issue which was not considered by the Board, on adequate evidence already before it, on its disposition of the appeals on April 19, 1968.

The Motions must therefore be denied.

Concurred in by: Gérard Legaré and F. Glogowski.

For the applicants: M. McLaughlin, Barrister and Solicitor;
For the respondent: R.E. Williams, Barrister and Solicitor.

plaintiff asserting a cause of action to claim all his relief in respect thereto, and prevents any second attempt to invoke the aid of the Courts for the same cause, for on his first recovery his entire cause of action has become merged in his judgment and is gone for ever. There is no qualification of the general principle where the cause of action is one and the same."

Dans l'affaire Maynard c. Maynard, (1951) R.C.S. 345 M. Cartwright, juge à cette époque, cite et approuve la déclaration de principe (statement of law") faite par Wigram V.C. dans l'affaire Henderson c. Henderson 3 Hare 100; le juge Cartwright a déclaré ceci: "I believe I state the rule of the Court correctly when I say that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

Le Conseil Privé a récemment approuvé cette déclaration dans l'affaire Hoystead c. Commissioner of Taxation (1926) A.C. 155 à 170.

Le savant juge ajoute ensuite: "In the judgment of the Judicial Committee in Hoystead v. Commissioner of Taxation (supra), at page 165, is the following: Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.

If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

In my opinion the law is correctly stated in Halsbury's Laws of England (2nd Edition) Volume 13 at page 410, where it is said that the principle of estoppel applies "whether the point involved in the earlier decision, and as to which the parties are estopped is one of fact, or one of law, or one of mixed law and fact".

En tant que cour supérieure d'archives, la Commission ne voit aucune raison pour ne pas s'en tenir à la règle suivie par les autres tribunaux de même compétence. Par conséquent, la Commission ne fera

droit à une requête pour écarter la disposition finale d'un appel et pour faire recevoir une nouvelle preuve subséquente à une telle disposition que dans les cas suivants:

1. La partie qui cherche à présenter une telle preuve devra démontrer à la satisfaction de la Commission qu'elle n'a pas pu, tout en ayant exercé une diligence raisonnable, obtenir ladite preuve en temps utile avant l'audition de l'appel, et
2. La preuve ainsi recherchée et établie de façon satisfaisante, devra être d'une nature telle qu'elle pourrait justifier la révision par la Commission du jugement qu'elle a rendu après l'audition de l'appel.

Ces critères, appliqués aux requêtes déposées devant nous, peuvent nous aider à répondre à la question suivante: peut-on dire que la preuve nouvelle que la partie a cherché à administrer (i.e. les affidavits de M. Paul K.W. Chan et de M. Jack Quan) est de nature si importante, si pertinente qu'elle changerait de façon substantielle la nature des appels, donnant de ce fait à la Commission un motif suffisant pour réexaminer la première décision rendue à l'égard de ces appels?

La Commission estime que la réponse doit être négative. Sans aucun doute les deux affidavits que les requérants ont cherché à introduire constituent une preuve "nouvelle" dans le sens que le conseiller qui a comparu à l'audition des appels ne pouvait pas à cette époque, en dépit d'une diligence raisonnable, avoir connaissance de ceux-ci; par contre ces deux affidavits ne sont pas une preuve "nouvelle" dans le sens qu'ils n'introduisent aucun élément nouveau qui fournirait à la Commission un motif suffisant pour ré-examiner la décision qu'elle a rendue sur ses appels. Ces affidavits ne soulèvent aucun litige qui n'ait été étudié par la Commission lorsque celle-ci a examiné la preuve suffisante antérieurement présentée devant elle lors de la disposition des appels le 19 avril 1968.

En conséquence les requêtes sont rejetées.

Ont souscrit: Gérard Legaré et F. Glogowski.

Pour les requérants: Me M. McLaughlin;

Pour l'intimé: Me R.E. Williams.

7.
Areti TSANTILI (Iliopoulos), applicant,

v.

The Minister of Manpower and Immigration, respondent.

Date of the decision: September 9, 1968;
File: 68-5167.

Coram: J.C.A. Campbell, Vice-Chairman, Jean-Pierre Houle, U. Benedetti.

Motion to re-open a hearing. - Jurisdiction of the Board - the Board as a Superior Court of Record - functus officio: does not apply - inherent and continuing jurisdiction . - Circumstances which warrant an order to re-open.

Held: An appeal lies to the Board from an order of deportation made by a Special Inquiry Officer. To hear this appeal the Board has all the rights, powers and privileges vested in a superior court of record; the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction that may arise in relation to the making of an order of deportation. Functus officio, too easily and too often conceived as a doctrine, is merely an expression applied to an agent or donee of an authority who has performed the act authorized, so the authority is exhausted and at an end. Such an expression does not apply to a superior court, to a court with appellate jurisdiction . - The jurisdiction of the Board is continuing and before its order is executed nothing precludes or bars an appellant from filing with the Board a motion requesting an order to re-open and it will be for the applicant to show that in his case very special circumstances warrant such an order. The effect of the filing of a motion is only to suspend *pro tempore* the execution of an order. It is for the Board to pronounce whether the motion is *bien fondée* or futile or frivolous. What should constitute very special circumstances warranting a re-opening? The Board does not have as yet, any rules governing the matter but the Board, pursuant to SS. 7 and 22 of the Immigration Appeal Board Act, has the jurisdiction to pronounce on the matter and such a jurisdiction is inherent and discretionary. Furthermore the Board has an inherent jurisdiction in equity. - The Board has jurisdiction to order the re-hearing of an appeal.

Affidavits were filed by both parties in respect to the motion: these contained allegations related to the merits of the appeal and were in such flagrant contradiction that the only report to achieve the ends of justice is by way of a thorough and proper testing of such evidence and this has to be done by way of re-opening.
Motion granted.-

The judgment of the Board was delivered by:

Jean-Pierre Houle:

7.
Areti TSANTILI (Iliopoulos), requérant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 9 septembre 1968;
Dossier: 68-5167.

Coram: J.C.A. Campbell, vice-président, Jean-Pierre Houle, U. Benedetti

Requête en réouverture d'instance - Compétence de la Commission - la Commission est une Cour supérieure d'archives - functus officio: ne s'applique pas - compétence intrinsèque et continue. - Circonstances pouvant conduire à une ordonnance de réouvrir. - Loi de la Commission d'appel de l'immigration: 7, 14, 22.

Arrêt: Il y a appel à la Commission d'une ordonnance d'expulsion rendue par un enquêteur spécial. Pour entendre cet appel, la Commission possède tous les droits, les pouvoirs et les privilèges d'une cour supérieure d'archives; la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction qui peuvent se poser à l'occasion d'une ordonnance d'expulsion. Functus officio, trop souvent et trop facilement élevée au rang de doctrine, n'est qu'une expression pour désigner qu'un agent ou un commis a exécuté un acte prescrit, de façon telle que son autorité a été complètement exercée et s'est éteinte. Une telle expression ne s'applique pas à une cour supérieure, à une cour qui a compétence d'appel. - La compétence de la Commission est continue et, avant que son ordonnance ne soit exécutée, rien n'empêche un appelant d'inscrire une requête aux fins d'obtenir une ordonnance de réouverture d'instance, et il appartiendra à l'appelant d'établir les circonstances très particulières justifiant une telle ordonnance. L'inscription d'une telle requête n'a pour effet que de surseoir pro tempore à l'exécution d'une ordonnance d'expulsion. Il appartient à la Commission de décider si la requête est bien fondée ou si elle est futile et frivole. Quelles sont les circonstances très particulières qui justifient une réouverture d'instance? La Commission n'a pas encore de règles en la matière mais selon les articles 7 et 22 de la Loi de la Commission d'appel de l'immigration, la Commission a compétence pour en décider et cette compétence est intrinsèque et discrétionnaire. De plus la Commission a une compétence intrinsèque d'équité. - La Commission a compétence pour ordonner qu'un appel soit réentendu.

La preuve sous serment fournie par les deux parties est inéprouvée et elle est d'une si flagrante contradiction que le seul moyen de rendre justice est de soumettre cette preuve à un examen minutieux par voie de réouverture d'instance. Requête accueillie.

Le jugement de la Commission fut rendu par:

Jean-Pierre Houle:

THIS IS A MOTION TO RE-OPEN THE HEARING OF THE APPEAL of Areti Tsantili (Iliopoulos) against an order of deportation made by a Special Inquiry Officer on the 13th day of February, 1968.

The appeal was heard by the Immigration Appeal Board on the 22nd day of April 1968 and was dismissed on the same day and the Board further ordered and directed that pursuant to Section 15(1) of the Immigration Appeal Board Act, the deportation order be executed as soon as practicable. At the hearing the appellant was not present nor was she represented. The Respondent, the Minister of Manpower and Immigration, had filed a written submission on the 18th day of April, 1968.

The Board heard this motion to re-open the hearing of the appeal on the 9th day of July, 1968. The applicant was represented by Mr. Andrew F. Brewin, Q.C. M.P., of Toronto, Ontario, and Mr. R.E. Williams, Barrister and Solicitor appeared for the Minister of Manpower and Immigration.

In the course of their submissions counsel discussed the merits of the case. The Board however will not consider the merits since this is strictly a motion to re-open with the basic issues being; 1) does the Board has jurisdiction to re-open the hearing of an appeal and if the Board does have such jurisdiction, 2) are there sufficient grounds for the Board to order the re-opening of the hearing in the instant case.

The first submission of the applicant is that through no fault of her own she was not made aware of the date set for the hearing of her appeal and she did not attend at the appeal and involuntarily failed to present her case to the Board. Material in support of this submission is in the form of an affidavit by the applicant filed by her counsel with a Notice of an Application for the re-opening of the appeal, and dated the 24th day of May 1968.

Records of the Board pertaining to this matter should be looked at before examining the aforesaid affidavit. A perusal of the records reveals that the appellant had filed a Notice of Appeal on the 13th day of February 1968, same Notice including a further notice "that all notices and papers in connection with my appeal may be sent to me as follows: Areti Tsantili, 177 Spadina Avenue, Toronto, Ontario." The Notice of Hearing of the Appeal has been mailed to the applicant on the 3rd day of April 1968 at the address mentioned above in accordance with Rule 9 of the Immigration Appeal Board Rules: "9. Notice of the time and place of a hearing shall be sent by the Registrar to the appellant and the respondent and their counsel by registered mail at the addresses set out in the Notice of Appeal or the Reply." and Rule 25(2) says: "Where service is effected by registered mail, the effective date of such service shall be the date of mailing."

REQUETE EN REOUVERTURE D'AUDITION DE L'APPEL d'Areti Tsantili (Iliopoulos) d'une ordonnance d'expulsion rendue par un enquêteur spécial le 13 février 1968.

La Commission d'appel de l'immigration a entendu l'appel le 22 avril 1968 et l'a rejeté le même jour; elle a de plus ordonné en vertu de l'article 15(1) de la Loi sur la Commission d'appel de l'immigration que l'ordonnance d'expulsion soit exécutée aussitôt que possible. L'appelante n'assistait pas à l'audition de l'appel et elle n'y était pas représentée. L'intimé, le ministre de la Main-d'oeuvre et de l'immigration, avait déposé une plaidoirie écrite le 18 avril 1968.

La Commission a entendu cette requête de réouverture d'audition le 9 juillet 1968. La requérante était représentée par Monsieur le député Andrew F. Brewin, c.r., de Toronto, Ontario, et Me R.E. Williams occupait pour le ministre de la Main-d'oeuvre et de l'Immigration.

Au cours de leur plaidoirie, les procureurs ont discuté du fond de l'affaire. Cependant, la Commission ne considérera pas le fond puisque la requête vise exclusivement la réouverture et les points litigieux sont les suivants: 1) la Commission est-elle compétente pour réentendre l'appel et si oui, 2) existe-t-il des motifs suffisants dans l'instance pour que la Commission consente à la réouverture de l'audition.

La requérante soutient d'abord que, sans être en faute, elle n'a pas été avertie de la date fixée pour l'audition de son appel, elle ne s'est pas présentée à l'appel et elle a involontairement négligé de plaider sa cause devant la Commission. A l'appui de cette allégation, son procureur a soumis un affidavit signé par elle et un Avis de demande de réouverture de l'appel, en date du 24 mai 1968.

Il faut se reporter aux documents de la Commission ayant trait à cette affaire avant d'examiner l'affidavit sus-mentionné. Une lecture attentive de ces documents révèle que l'appelante a déposé un avis d'appel le 13 février 1968 et que cet avis contenait l'indication suivante: "that all notices and papers in connection with my appeal may be sent to me as follows: Areti Tsantili, 177 Spadina Avenue, Toronto, Ontario." L'avis d'audition d'appel a été posté à la requérante le 3 avril 1968 à l'adresse ci-devant mentionnée conformément à la règle 9 des Règles de la Commission d'appel de l'immigration: "9. Le registraire envoie, par lettre recommandée, un avis du temps et du lieu de l'audition à l'appelant, à l'intimé, et à leur conseiller, aux adresses mentionnées dans l'avis d'appel ou dans la réponse." La règle 25(2) stipule que: "Si la signification est effectuée par lettre recommandée, la date de la signification est la date de mise à la poste.

Dans le même Avis d'appel, la requérante a de plus indiqué qu'elle autorisait M. John Hladun, expert-conseil en relations publiques, dont l'adresse est 31 Concord Avenue, Toronto 4, Ontario, à la représenter comme conseiller occupant dans toute affaire relative à

In the same Notice of Appeal, the applicant served further notice whereby she authorized a Mr. John Hladun, Public Relations Consultant, whose address is 31 Concord Avenue, Toronto 4, Ontario, to represent her as her counsel of record in all matters relating to her appeal; and the applicant gave further notice that she wished to be present or represented at the hearing of the appeal to make oral submission to the Board. The above mentioned Mr. Hladun wrote to the Immigration Appeal Board on April 3rd, 1968, saying, inter alia,: "This is to advise you that I have resigned as a counsel to the above-named (Areti Tsantili) and shall not appear before you to plead her case if and when the hearing of her appeal will be held." Receipt of the aforesaid letter was acknowledged in a letter dated April 5th, 1968, under the signature of R. Hélie, Deputy Registrar. The Board set the 22nd day of April, 1968, for the hearing of the appeal.

The affidavit of the applicant dated 24th May, 1968 reads as follows:

"I, ARETI (TSANTILI) ILIOPOULOS, of the City of Toronto, in the County of York, Married Woman, MAKE OATH AND SAY AS FOLLOWS:

1. I am a citizen of Greece and came to Canada as a visitor in the month of July 1967 to visit my uncle Peter Golias who lives in Toronto at 177 Spadina Avenue.
2. On the 13th day of February, 1968 an order for my deportation was made by a Special Inquiry Officer.
3. I entered an appeal to the Immigration Appeal Board. I was represented at the Inquiry by one John Hladun but as I was unable to pay the fee which he requested he ceased to represent me after the Inquiry.
4. On or about the 1st day of April, 1968 my father came to Canada to visit me at the time of my marriage to Thomas Iliopoulos whom I had known in Greece and to whom I was engaged to be married. I moved to 749 Euclid Avenue where my father was residing. My new address was given to the Immigration Office in Toronto by my fiancée.
5. On the 22nd of April, 1968 I was married to the said Thomas Iliopoulos at the Greek Orthodox Church at 115 Bond Street, Toronto, and we have lived together as man and wife at 35 Follis Avenue, in Toronto, as my husband reported to the Immigration Office at Toronto.
6. On the 22nd day of April, 1968, as I know now, my appeal was dismissed by the Immigration Appeal Board.

had withheld this letter and I knew nothing of the appeal hearing until the 4th of May, 1968.

8. It was always my intention to make representations at the hearing of my appeal and in particular to call the attention of the Immigration Appeal Board to my marriage.
9. My husband is a landed immigrant who came to Canada on the 3rd of May, 1963. He is steadily employed as a machinist."

L'affidavit est pertinent au premier argument de la requérante en ce que: 1) à son arrivée au Canada, la requérante demeurait au 177 Spadina Avenue; 2) vers le 1er avril 1968, la requérante a déménagé au 749 Euclid Avenue et elle a donné sa nouvelle adresse au Bureau de l'immigration à Toronto; 3) elle n'a reçu aucun avis d'audition d'appel et elle n'a rien appris quant à l'audition de l'appel avant le 4 mai 1968; 4) elle a toujours eu l'intention de soumettre une plaidoirie à l'audition de son appel.

Qu'il suffise à la Commission de noter pour le moment que le dossier révèle qu'un avis d'audition d'appel a été envoyé par courrier recommandé le 3 avril 1968 et que l'affidavit ci-devant mentionné a été donné sous serment et qu'il n'a pas été visé et qu'il demeure à ce jour non visé.

La requérante soutient ensuite que 1) elle s'est mariée le 22 avril 1968 et elle vit depuis avec son mari au 36 Follis Avenue à Toronto 2) au moment de l'audition de l'appel, la Commission ne pouvait savoir que la requérante allait se marier ou se mariait de fait le jour même de l'audition de l'appel et la Commission a décidé de l'affaire sans rien savoir de son mariage.

Ce mariage n'est pas contesté et la Commission reconnaît qu'au moment de l'audition elle n'avait reçu aucun renseignement à ce sujet.

La requérante soutient enfin ceci: "it seems to me that the original order unquestionably would have been modified had the Board known this fact." (il s'agit du mariage).

Cette dernière supposition sera traitée plus adéquatement à l'examen de l'argumentation juridique.

L'argumentation juridique de la requérante est fondée comme suit: 1) l'article 7(1) de la Loi sur la Commission d'appel de l'Immigration stipule que la Commission est une cour d'archives et le paragraphe (2) de cet article reconnaît à la Commission, en ce qui concerne toute question nécessaire ou appropriée à l'exercice régulier de sa compétence, tous les pouvoirs, droits et privilèges conférés à une cour

7. I received no notice of the hearing of the appeal. My husband was called by my uncle on the 4th day of May, 1968 on the telephone and when my husband went over to see him a letter notifying me of the date of the hearing of the appeal contained in an envelope addressed to me at 177 Spadina Avenue was shown to him. For some reason my uncle had withheld this letter and I knew nothing of the appeal hearing until the 4th of May, 1968.
8. It was always my intention to make representations at the hearing of my appeal and in particular to call the attention of the Immigration Appeal Board to my marriage.
9. My husband is a landed immigrant who came to Canada on the 3rd of May, 1963. He is steadily employed as a machinist."

The relevant parts of the affidavit in relation to the applicant's first submission are 1) that on her arrival in Canada, the applicant resided at 177 Spadina Avenue; 2) that on or about the 1st day of April, 1968, she moved to 749 Euclid Avenue and that her new address was given to the Immigration Office in Toronto; 3) that she received no notice of the hearing of the appeal and that she knew nothing of the appeal hearing until the 4th of May, 1968; 4) that it was always her intention to make representations at the hearing of her appeal.

Suffice it to be, at this stage, for the Board to note that Records show that Notice of Hearing of an Appeal had been mailed by registered mail on the 3rd day of April, 1968, that the affidavit referred to above is a sworn affidavit and that said affidavit had not been tested and remains, up to this moment, untested.

The second submission of the applicant is that (1) on the 22nd of April, 1968, she was married and has lived since with her husband, as man and wife, at 36 Follis Avenue, in Toronto; (2) at the time of the hearing of the appeal there was nothing before the Board to show that the applicant was either about to be married or was in fact married on the same day as the appeal was heard and that the Board had disposed of this matter without any knowledge of her marriage.

The marriage here is not in dispute and the Board recognizes that at the time of the hearing it had no information on it.

The third submission of the applicant is that "it seems to me that the original order unquestionably would have been modified had the Board known this fact" (that is the fact of the marriage).

This third submission of the applicant will be dealt with more appropriately in an examination of the legal arguments.

son appel; la requérante a de plus indiqué qu'elle souhaitait assister ou être représentée à l'audition de l'appel afin de soumettre sa cause de vive voix à la Commission. M. Hladun, ci-devant mentionné, a écrit à la Commission d'appel de l'immigration le 3 avril 1968, l'informant entre autre de ceci: "This is to advise you that I have resigned as counsel to the above-named (Areti Tsantili) and shall not appear before you to plead her case if and when the hearing of her appeal will be held." Une lettre signée par R. Hélie, registraire adjoint, en date du 5 avril 1968, accusait réception de cette lettre. La Commission a fixé au 22 avril 1968 la date d'audition de l'appel.

L'affidavit signé par la requérante le 24 mai 1968 est le suivant:

"I, ARETI (TSANTILI) ILIOPOULOS, of the City of Toronto, in the County of York, Married Woman, MAKE OATH AND SAY AS FOLLOWS:

1. I am a citizen of Greece and came to Canada as a visitor in the month of July 1967 to visit my uncle Peter Golias who lives in Toronto at 177 Spadina Avenue.
2. On the 13th day of February, 1968 an order for my deportation was made by a Special Inquiry Officer.
3. I entered an appeal to the Immigration Appeal Board. I was represented at the Inquiry by one John Hladun but as I was unable to pay the fee which he requested he ceased to represent me after the Inquiry.
4. On or about the 1st day of April, 1968 my father came to Canada to visit me at the time of my marriage to Thomas Iliopoulos whom I had known in Greece and to whom I was engaged to be married. I moved to 749 Euclid Avenue where my father was residing. My new address was given to the Immigration Office in Toronto by my fiancée.
5. On the 22nd of April, 1968 I was married to the said Thomas Iliopoulos at the Greek Orthodox Church at 115 Bond Street, Toronto, and we have lived together as man and wife at 35 Follis Avenue, in Toronto, as my husband reported to the Immigration Office at Toronto.
6. On the 22nd day of April, 1968, as I know now, my appeal was dismissed by the Immigration Appeal Board.
7. I received no notice of the hearing of the appeal. My husband was called by my uncle on the 4th day of May, 1968 on the telephone and when my husband went over to see him a letter notifying me of the date of the hearing of the appeal contained in an envelope addressed to me at 177 Spadina Avenue was shown to him. For some reason my uncle

The legal argument of the applicant is based on the following basis: 1) Section 7(1) of the Immigration Appeal Board Act constitutes the Board a Court of Record and subsection (2) of same Section 7 gives the Board in matters necessary and proper for the due exercise of its jurisdiction, all such rights, powers and privileges which are vested in a Superior Court of Record, and Section 22 gives the Board sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an Order for Deportation; 2) a Superior Court of Record has an inherent jurisdiction which extends to the right of re-hearing and it is one right that ought to be exercised where it appears that an injustice may have been done or that the Court may have unconsciously acted on a wrong presumption of facts; this inherent right is also a discretionary right to be exercised where there is a default judgment, where the judgment is not a full judgment of the matter, and cannot be fully determined in the absence of one of the parties.

As an illustration of the two principles enunciated above as being the substratum of the exercise of the inherent and discretionary right of re-hearing, Counsel for the Applicant has referred to several cases:

Shaw v. Nickerson 7 Upper Canada Queens Bench Reports, 541.

Hughes v. Peel 9 Ontario Practice Reports, 127.

Fleet v. Wey 14 Practice Reports, 123.

Davis v. Tunnel Bridge Spinning Co. Ltd., reported in 27 Butterworth's Workmen's Compensation Cases, 207.

Although the decisions in the cases cited have been rendered by very learned and powerful Judges and refer to some basic principles underlying the rule, three of them are only slightly relevant to the matter involved in the present instance: the right to re-open or re-hear an appeal. The first three cases deal with the setting aside of orders made by default or ex parte, by Judges or Masters in chambers. The fourth case deals with the so-called doctrine of functus officio and in that case all the judges were of the opinion that the doctrine did not apply unless the matter was fully completed.

Counsel for the Applicant draws the conclusion that when a court was made aware that it had decided something wrongly without a full apprehension of the facts, it always had jurisdiction, a basic equity jurisdiction, to do justice; that the doctrine of functus officio would apply to administrative tribunals only and therefore not to the Board since the Board is a Superior Court of Record vested with an inherent jurisdiction.

The submission of the Respondent is that the facts and the material submitted show that this motion is substantially without grounds. In support of this submission the Respondent has filled an

supérieure d'archives; par ailleurs, l'article 22 donne à la Commission compétence exclusive pour entendre et décider toute question de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion; 2) de par la juridiction qui lui est inhérente, une cour supérieure d'archives a le droit de rouvrir l'audition et ce droit elle doit l'exercer lorsqu'il semble y avoir eu une injustice, ou que la cour a sans le savoir fondé sa décision sur une mauvaise présomption de fait; ce droit inhérent est aussi un droit discrétionnaire qui doit s'exercer lorsqu'il y a eu jugement par défaut ou lorsque le jugement ne tranche pas toute la question ou lorsque la décision finale ne peut être prise en l'absence de l'une des parties.

Pour démontrer que les principes énoncés plus haut sous-tendent l'exercice du droit inhérent et discrétionnaire de réouverture d'audition, le procureur de la requérante a cité plusieurs arrêts:

Shaw c. Nickerson 7 Upper Canada Queens Bench Reports, 541.

Hughes c. Peel 9 Ontario Practice Reports, 127.

Fleet c. Wey 14 Practice Reports, 123.

Davis c. Tunnel Bridge Spinning Co. Ltd. publié dans 27 Butterworth's Workmen's Compensation Cases, 207.

Ces décisions ont été rendues par des juristes très compétents et elles portent sur les principes fondamentaux sur lesquels se fonde la règle, mais trois de ces décisions n'ont qu'un rapport éloigné à la question qui se pose dans l'instance: le droit de rouvrir ou de réentendre un appel. Les trois premières décisions portent sur l'annulation d'ordonnances rendues par ex parte par des juges ou par des protonotaires (Masters). La quatrième décision porte sur la prétendue doctrine du functus officio et dans cette affaire tous les juges se disent d'avis que la doctrine ne s'applique pas à moins que la question soit close.

Le procureur de la requérante conclut que lorsqu'une cour a été informée qu'elle a pris une mauvaise décision sans tenir compte de tous les faits elle est toujours habiletée de par une juridiction fondamentale en équité, à rendre justice; cette doctrine du functus officio ne s'appliquerait qu'aux tribunaux administratifs et elle ne s'appliquerait donc pas à la Commission puisque la Commission est une cour supérieure d'archives investie d'une juridiction inhérente.

L'intimé soumet que les faits et les documents présentés démontrent que cette requête n'est pas motivée quant au fond. A l'appui de cet argument, l'intimé a déposé un affidavit signé sous serment par M. John Hladun, dont il a déjà été question, en date du 26 juin 1968 et deux déclarations statutaires, faites le 5 juillet 1968, l'une par M. W.J. Hartley, et l'autre par M. H.A. McCauley, fonctionnaires

affidavit dated and sworn on the 26th day of June, 1968 by Mr. John Hladun, the same gentleman previously referred to, and two statutory declarations one from Immigration Officer W.J. Hartley and the other by Immigration Officer H.A. McCauley and both dated on 5th day of July 1968. It should be noted and it is deplored that evidence of this nature, the two statutory declarations, were not communicated to the Applicant nor to the Board before the hearing of the motion to re-open but were submitted at the opening of the hearing of the said motion.

The relevant part of the affidavit of Mr. John Hladun is: "4. Subsequently, I advised Areti Tsantili, through her uncle Mr. Peter Golias, and in her presence, of the contents of the letter I had received from the Deputy Registrar, and in particular of the date and time of the hearing of her appeal." The letter referred to from the Deputy Registrar is dated 5 April 1968.

Statutory Declaration by Immigration Officer H.A. McCauley recites that:

"Areti Tsantili reported to this office 20 March 1968 with her cousin's wife and daughter. The daughter spoke perfect English and Miss Tsantili situation in regards to the Immigration Division was fully explained. The cousin's daughter acknowledged this and explained to Miss Tsantili in the Greek language.

They asked for Miss Tsantili passport saying she intended marriage and required same for identification. They were under the impression her immigration status had been cleared.

The fiance reported 2 April 1968 - Thomas Iliopoulos - and wanted to take over the responsibility of the Bond of Conditional release and stated he would marry Miss Tsantili in any case. He also stated her relatives in Toronto were against this marriage. I explained to Mr. Iliopoulos that the notice of appeal was not yet received and suggested when Miss Tsantili received her notice of appeal he could appear at the appeal hearing with her and state his intentions.

On 3 April 1968 Miss Tsantili's relative Mr. Peter Golias appeared to state Miss Tsantili had left his home to live with Mr. Iliopoulos at 274 Euclid Avenue and wanted to withdraw his support.

The Notice of Hearing and Decision of appeal was sent to 177 Spadina Road the home of Mr. Peter Golias and Mrs. Golias claimed any mail received was picked up by Mr. Iliopoulos.

à l'immigration. Il faut noter et il est à déplorer que des preuves de ce genre, les deux déclarations statutaires, n'aient pas été communiquées ni à la requérante ni à la Commission avant l'audition de la requête de réouverture; elles n'ont été présentées qu'à l'ouverture de l'audition de ladite requête.

Le passage pertinent de l'affidavit de M. John Hladun est le suivant: "4. Subsequently, I advised Areti Tsantili, through her uncle Mr. Peter Golias, and in her presence, of the contents of the letter I had received from the Deputy Registrar, and in particular of the date and time of the hearing of her appeal." La lettre du registraire adjoint dont il est question est en date du 5 avril 1968.

La déclaration statutaire de M. H.A. McCauley, fonctionnaire à l'immigration, est la suivante:

"Areti Tsantili reported to this office 20 March 1968 with her cousin's wife and daughter. The daughter spoke perfect English and Miss Tsantili situation in regards to the Immigration Division was fully explained. The cousin's daughter acknowledged this and explained to Miss Tsantili in the Greek Language.

They asked for Miss Tsantili passport saying she intended marriage and required same for identification. They were under the impression her immigration status had been cleared.

The fiance reported 2 April 1968 - Thomas Iliopoulos - and wanted to take over the responsibility of the Bond of Conditional release and stated he would marry Miss Tsantili in any case. He also stated her relatives in Toronto were against this marriage. I explained to Mr. Iliopoulos that the notice of appeal was not yet received and suggested when Miss Tsantili received her notice of appeal he could appear at the appeal hearing with her and state his intentions.

On 3 April 1968 Miss Tsantili's relative Mr. Peter Golias appeared to state Miss Tsantili had left his home to live with Mr. Iliopoulos at 274 Euclid Avenue and wanted to withdraw his support.

The Notice of hearing and Decision of appeal was sent to 177 Spadina Road the home of Mr. Peter Golias and Mrs. Golias claimed any mail received was picked up by Mr. Iliopoulos.

On May 1, 1968, Miss Tsantili reported to this office with Mr. Thomas Iliopoulos and presented their marriage certificate, copy of this on our file. Mr. Iliopoulos denied everything that was discussed with him previously and was under the impression their marriage automatically cancelled the deportation decision by the Immigration Appeal Board. He had this notice in his possession.

On May 1, 1968 Miss Tsantili reported to this office with Mr. Thomas Iliopoulos and presented their marriage certificate, copy of this on our file. Mr. Iliopoulos denied everything that was discussed with him previously and was under the impression their marriage automatically cancelled the deportation decision by the Immigration Appeal Board. He had this notice in his possession.

He, Mr. Iliopoulos, then stated he would send his wife to his sister in Germany and would submit an application for her legal admission to Canada.

I agreed to allowing voluntary departure and instructed them to inform this office of travel arrangements.

and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "THE CANADA EVIDENCE ACT".

Statutory Declaration of Immigration Officer W.J. Hartley declares that:

"On April 9, 1968, Miss Areti Tsantili reported to this office accompanied by her fiance Mr. Thomas Iliopoulos. At that time she had in her possession the "Notice of Hearing" dated April 3, 1968 from the Immigration Appeal Board. It was explained to her that she should appear in person at the hearing and if she wanted the fiance could accompany her. They mentioned the plan to marry before the hearing and therefore we emphatically stated if this happened they should both appear and take their marriage license. This couple were fully aware of the Appeal Hearing date and I would repeat the "Notice of Hearing" was in her hand.

and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "THE CANADA EVIDENCE ACT".

The aforesaid affidavit, the two statutory declarations and the affidavit filed by the Applicant, have not been tested and remain untested.

The matter involved here is one of a motion to re-open and the Board followed the normal procedure in dealing with it on the material submitted, namely the affidavit evidence.

Having heard the submission in relation to the material introduced and having examined this material, the Board finds that it is faced with diametrically opposed affidavit evidence, with

He, Mr. Iliopoulos, then stated he would send his wife to his sister in Germany and would submit an application for her legal admission to Canada.

I agreed to allowing voluntary departure and instructed them to inform this office of travel arrangements.

and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "THE CANADA EVIDENCE ACT".

La déclaration statutaire de M. W.J. Hartley, fonctionnaire à l'immigration, est la suivante:

"On April 9, Miss Areti Tsantili reported to this office accompanied by her fiance Mr. Thomas Iliopoulos. At that time she had in her possession the "Notice of Hearing" dated April 3, 1968 from the Immigration Appeal Board. It was explained to her that she should appear in person at the hearing and if she wanted the fiance could accompany her. They mentioned the plan to marry before the hearing and therefore we emphatically stated if this happened they should both appear and take their marriage license. This couple were fully aware of the Appeal Hearing date and I would repeat the "Notice of Hearing" was in her hand.

and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of "THE CANADA EVIDENCE ACT".

L'affidavit ci-devant mentionné, les deux déclarations statutaires et l'affidavit déposé par la requérante n'ont pas été visés et demeurent non-visés.

Il s'agit ici d'une requête en réouverture et la Commission a suivi la procédure normale en tentant de résoudre la question d'après les documents présentés, soit les affidavits déposés en preuve.

Ayant entendu les arguments relatifs aux documents présentés et ayant examiné ces documents, la Commission découvre que les affidavits mis en preuve sont diamétralement opposés et que la preuve est absolument contradictoire; la Commission doit conclure que cette preuve doit être dûment et régulièrement visée afin que justice soit faite dans cette affaire.

Il s'agit maintenant de savoir si la réouverture de l'audition de l'appel d'Areti Tsantili constituerait un recours approprié: est-ce que la réouverture de l'audition permettra de rendre justice?

evidence which is in complete contradiction and the Board cannot but draw the conclusion that such evidence must be duly and properly tested with the view of achieving the ends of justice in this case.

Now the question is: does an order to re-open the hearing of the appeal of Areti Tsantili constitute the appropriate remedy: will the re-opening of the hearing pave the way for justice to be rendered?

This question brings the Board back to the basic issues in this application: 1) does the Board have jurisdiction to re-open the hearing of an appeal, and 2) if the Board does have such jurisdiction are there sufficient grounds for the Board to order the re-opening of the hearing in the instant case?

The legal argument of the Respondent rests on two branches: one is that the judgment pronounced by the Board at the hearing of the appeal of Areti Tsantili, on the 22nd day of April 1968, is not a default but a final and conclusive judgment. It is not an ex parte judgment: the second is that in law the Board is now functus officio.

In support of the second branch of his argument Counsel for Respondent cited abundantly from Her Majesty the Queen and Gartland Steamship Company, 1958 Exchequer Court Reports, 69, a case (motion) before Mr. Justice Cameron in Chambers. The basic question at issue being: when does a judgment from this Court (Exchequer) become final and operative? Counsel speaking against the motion argued that once a judgment was entered the court was functus officio and that the entry in a docket book (pursuant to Section 81 of the Exchequer Court Act) was an entry of the judgment and that was all there was to it. Against that Counsel speaking for the motion argued that a judgment is not really entered until the formal order with the minutes of it have been brought in and entered: until then the court had the power to vary its own orders.

This matter of entry of judgments in a docket book is of a rather technical nature and to deal with it even by way of analogy, since the Board has no rule on the subject although it keeps a book of records, would be a specious generalization. Rule 174 of the Exchequer Court recites: "Where a judgment is pronounced by the Court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced and the judgment shall take effect from that date, unless the Court shall otherwise order or direct that the judgment be ante-dated or post-dated." One is at some difficulty trying to couple this Rule with the so-called doctrine of functus officio.

Counsel for the Respondent in his submission to the Board went on to say: "This decision (the Board's decision) was made on the 22nd April and it is recorded in the record books of this Board what the decision was. I suggest therefore that the decision is final, that it

Cette question ramène la Commission aux points litigieux fondamentaux dans cette requête: 1) la Commission est-elle compétente pour ré-entendre l'appel et si oui, 2) existe-t-il des motifs suffisants dans l'instance pour que la Commission consente à la réouverture de l'audition.

L'argumentation juridique de l'intimé repose sur deux propositions: la première est que le jugement rendu par la Commission à l'audition de l'appel d'Areti Tsantili le 22 avril 1968 n'est pas un jugement par défaut mais un jugement final et concluant. Il ne s'agit pas d'une décision ex parte. Deuxièmement, la Commission se trouve désormais, d'après la loi, functus officio.

A l'appui de la deuxième proposition de son argument, le procureur de l'intimé a cité de nombreux passages de la décision Her Majesty the Queen and Gartland Steamship Company, 1958, Exchequer Court Reports, 69. Il s'agit d'une requête en référé devant le juge Cameron. La question fondamentale sur laquelle portait le débat était la suivante: à quel moment la décision de la Cour (de l'échiquier) devient-elle finale et opérante? Le procureur a soutenu contre la requête que lorsqu'un jugement a été enregistré la cour se trouvait functus officio et qu'un jugement porté au registre des jugements rendus (en vertu de l'article 81 de la Loi sur la Cour de l'échiquier) est enregistré une fois pour toutes. Ce contre quoi le procureur en faveur de la requête a soutenu qu'un jugement n'est pas vraiment enregistré avant que l'ordonnance officielle et le procès-verbal aient été déposés et enregistrés: entre temps la cour a le pouvoir de modifier ses propres ordonnances.

La question de l'enregistrement des jugements est de nature plutôt technique et, puisque la Commission n'a établi aucune règle à ce sujet, même si elle garde un registre des jugements, il faudrait avoir recours à une généralisation spé cieuse pour se prononcer sur ce sujet. La règle 174 de la Cour de l'échiquier stipule que: "lorsqu'un jugement est rendu par cette Cour, l'inscription du jugement doit porter la date du jour où ce jugement est rendu, et le jugement entrera en vigueur à compter de ladite date, à moins que la Cour n'ordonne ou ne prescrive que le jugement soit ant daté ou post daté. Il est difficile de réconcilier cette règle et la prétendue doctrine du functus officio.

Le procureur de l'intimé ajoutait ceci à sa plaidoirie: "This decision (the Board's decision) was made on the 22nd April and it is recorded in the record books of this Board what the decision was. I suggest therefore that the decision is final, that it is, that the Board is functus officio as Mr. Justice Cameron said the Exchequer Court was under similar circumstances." (Her Majesty the Queen c. Gartland Steamship Company).

La Commission trouve très difficile d'accepter cette thèse du procureur "that the Board is functus officio as Mr. Justice Cameron said the Exchequer Court was under similar circumstances." D'abord ,

is, that the Board is functus officio as Mr. Justice Cameron said the Exchequer Court was under similar circumstances." (Her majesty the Queen and Gartland Steamship Company).

The Board would find it extremely difficult to accept the suggestion from Counsel "that the Board is functus officio as Mr. Justice Cameron said the Exchequer Court was under similar circumstances". First one cannot find in the judgment referred to supra that Mr. Justice Cameron has said that the Exchequer Court was functus officio. It was rather a submission made by Counsel for the defendants opposing the application on the ground that the Court is without jurisdiction to grant leave to present further argument; secondly one is not struck by the similarity of the circumstances: the instance before Mr. Justice Cameron was one of a motion for leave to present further argument after judgment and the head note of the report reads: "Held: That after a judgment has been pronounced and entered the Court is powerless on a matter of law which was considered in the judgment." The instance before the Board is one of a motion requesting an order to re-open a hearing and once again the basic issues are: does the Board have jurisdiction to re-open and if so are there proper grounds submitted to the Board on which it can order such a re-opening.

It is of some interest to cite Mr. Justice Cameron in the Gartland Steamship case at page 75: "I have looked at the report of the Copeland-Chatterson case referred to above. (Copeland-Chatterson v. Paquette (1906) 10 Ex. C.R. 425). So far as I am aware, it is the only reported case in which the Court has allowed a motion to reconsider the terms of a final judgment. There is nothing in the judgment as reported to suggest that the question of the Court's jurisdiction to hear such a motion was raised or considered. It seems to have been assumed that the Court had such jurisdiction, possibly by reason of the then Rule 174".

Also in support of his argument that the Board was functus officio in regard to this matter, Counsel for the Respondent relied on decisions rendered by the Board in Moreira and Da Silva (heard on April 9, 1968) and in Federico De LosReyes (decision rendered on June 6, 1968.) Here again Counsel for Respondent relies on the similarity of these cases to the instant case and again the Board finds difficulty in accepting the suggestion of similarity. True that in Moreira and Da Silva, Chairman of the panel, in a decision rendered from the Bench, has pronounced "that the Board is now functus officio" but the remainder of the pronouncement has to be cited: "and it is not possible for us to direct the re-opening of the inquiries". Not possible for us to direct the re-opening of the inquiries. This is the part of the pronouncement which has to be retained and which annihilates any suggestion of similarity. It may well be doubted that the Chairman of the panel was at liberty to pronounce the Board functus officio but the motion entertained was one for the re-opening in order to adduce fresh evidence. The Board decided, and properly so, to apply the

on ne peut trouver dans la décision ci-devant mentionnée aucune assertion du juge Cameron à l'effet que la Cour de l'échiquier était functus officio. Il s'agit là d'un argument du procureur de la défense qui s'opposait à la demande sous prétexte que la Cour n'avait pas juridiction pour permettre la présentation de nouveaux arguments; deuxièmement, la similarité des circonstances n'est pas évidente: M. le juge Cameron devait décider d'une requête demandant la permission de présenter de nouveaux arguments après le jugement et le résumé du rapport affirme ceci: "Held: that after a judgment has been pronounced and entered the Court is powerless on a matter of law which was considered in the judgment." La Commission doit décider d'une requête de réouverture d'audition et, encore une fois, les questions fondamentales sont les suivantes: La Commission est-elle compétente pour réentendre l'appel et si oui, existe-t-il des motifs suffisants dans l'instance pour que la Commission consente à la réouverture de l'audition.

Il serait intéressant de citer M. le juge Cameron dans l'affaire Gartland Steamship, à la page 75: "I have looked at the report of the Copeland-Chatterson case referred to above. (Copeland-Chatterson c. Paquette (1906) 10 Ex. C.R. 425). So far as I am aware, it is the only reported case in which the Court has allowed a motion to reconsider the terms of a final judgment. There is nothing in the judgment as reported to suggest that the question of the Court's jurisdiction to hear such a motion was raised or considered. It seems to have been assumed that the Court had such jurisdiction, possibly by reason of the then Rule 174..."

Pour appuyer son argument selon lequel la Commission est functus officio dans cette affaire, le procureur de l'intimé a eu recours aux décisions rendues par la Commission dans l'affaire Moreira et Da Silva (entendue le 9 avril 1968) et dans l'affaire Federico De Los Reyes (décision rendue le 6 juin 1968). Encore une fois, le procureur de l'intimé s'appuie sur la similarité entre ces cas et l'affaire en instance mais la Commission trouve difficile de reconnaître une telle similarité. Il est vrai que dans les affaires Moreira et Da Silva, le président de la Cour, dans une décision rendue à la suite des débats a déclaré "that the Board is now functus officio" mais le reste de sa déclaration doit être cité: "and it is not possible for us to direct the re-opening of the inquiries..." Il ne nous est possible d'ordonner la réouverture des enquêtes. Cette partie de la déclaration doit être retenue et elle annule toute possibilité de similarité. On peut se demander si le président de la Cour était libre de déclarer la Commission functus officio mais la requête en instance visait à la réouverture en vue de l'administration de nouvelles preuves. La Commission a décidé, avec raison, d'appliquer les principes généraux selon lesquels pour rouvrir un procès il faut démontrer que la nouvelle preuve ne pouvait être administrée au procès malgré toute la diligence qu'on peut attendre, et que d'autre part, cette preuve, si elle est admise, sera concluante. Les mêmes principes ont été maintenus et appliqués dans l'affaire Federico De Los Reyes (raisons données par A.B. Weselak, membre de la Commission),

general principles that to re-open a trial it must appear that both the evidence could not by due diligence have been made available at the trial and also if admitted that it would be practically conclusive. The same principles were held and applied in Federico De Los Reyes (reasons given by A.B. Weselak, Member), in Chen Wu and Fung (reasons by J.V. Scott, Chairman) and in Ali Sleiman Yehia and Hussein Sleiman Yehia (reasons given by J.C.A. Campbell, Vice-Chairman). These decisions rendered by the Board are of little assistance in the matter now before the Board where there is no question of introducing new evidence or, at least, where there is no question of seeking the granting of a motion on the basis of new evidence to be adduced.

Having disposed of this branch of his argument, that the Board is functus officio in regard to this matter, Counsel for Respondent raised the question as to whether this Board ought to re-open the appeal, which question is of law.

Counsel for the Respondent then said: "I have been unable to find any authorities dealing directly with the question." The rarity of authorities and the paucity of the doctrine on the subject is an euphemism. To quote Counsel: "A case in the Supreme Court of Canada in 1949 called the Boucher case shed no light whatever on the grounds argued or the reasons given for entertaining a new appeal." There would be, according to Counsel, another example of a re-hearing of an appeal by the Supreme Court in the Poole case (yet unreported) but there again "there is no indication as to why the court re-heard that appeal, having already dealt with it, one might presume conclusively". It would appear that these constitute the whole of the cases of re-hearing.

Rule 61 of the Rules of the Supreme Court of Canada provides that "There shall be no re-hearing of an appeal except by the leave of the Court on a special application, or at the instance of the Court". One must say, in all due deference, that the conciseness of the Rule is not of great help in trying to reason the matter now before the Board. It is a fact that the Board has as yet no rules governing the re-hearing of appeals but the Board has, unquestionably, the power to enact such rules whenever it sees fit to do so.

The argument of Counsel for the Respondent is that there may be some inherent jurisdiction in the Board to re-open a case, that there is no doubt that in an appropriate case it must be possible to re-hear, but this is not an appropriate case and that in any event there are certain considerations which ought to be gone into at any time when the Board is going to re-open.

In trying to shed some light on the matter Counsel for the Respondent referred the Board to and relied, to a great extent, on an article written by two learned American jurists at the invitation of the Editors of The Canadian Bar Review and published in Vol. 34 for the year 1956 of same Review. (pp: 898-938) The article is entitled

dans l'affaire Chen Wu et Fung (raisons données par Mlle J.V. Scott, président) et dans l'affaire Ali Sleiman Yehia et Hussein Sleiman Yehia (raisons données par le vice-président, J.C.A. Campbell). Ces décisions rendues par la Commission ne sont pas très utiles dans l'instance puisqu'il n'est pas question d'administrer de nouvelles preuves du moins n'est-il pas question de fonder la requête sur l'administration de nouvelles preuves.

Ayant exposé son premier argument, selon lequel la Commission est functus officio dans cette affaire, le procureur de l'intimé a soulevé un point de droit, à savoir si la Commission devrait rouvrir l'appel.

Le procureur de l'intimé a dit: "I have been unable to find any authorities dealing directly with the question." C'est un euphémisme que de dire que la doctrine et les précédents à ce sujet sont rares. Le procureur a affirmé "A case in the Supreme Court of Canada in 1949 called the Boucher case shed no light whatever on the grounds argued or the reasons given for entertaining a new appeal." Il y aurait, selon le procureur, un autre cas de réouverture d'audition d'appel en Cour suprême dans l'affaire Poole (qui n'est pas encore publiée) mais là encore "there is no indication as to why the court re-heard that appeal, having already dealt with it, one might presume conclusively." Il semblerait que ce soient les seuls cas de réouverture d'audition.

La règle 61 des Règles de la Cour Suprême du Canada prévoit que:

"Aucun appel ne doit être entendu de nouveau, sauf avec l'autorisation de la Cour sur requête spéciale ou à la demande de la Cour."

Il faut dire, très respectueusement, que la règle est trop concise pour être utile dans la question que nous devons traiter. Il est vrai que la Commission n'a pas encore de règle concernant la réouverture de l'appel mais elle est sans conteste compétente à adopter de telles règles si elle le juge approprié.

Le procureur de l'intimé soutient que la Commission a peut-être une juridiction inhérente pour réentendre une affaire, qu'il est évident que si l'affaire s'y prête, il doit être possible de la réentendre, mais que dans l'instance l'affaire ne s'y prête pas et que de toute façon, la Commission doit toujours tenir compte de certaines considérations lorsqu'elle se prépare à une réouverture d'instance.

Afin d'éclairer cette question le procureur de l'intimé a eu recours à un article écrit par deux éminents juristes américains, article auquel il a renvoyé la Commission. L'article en question, a été écrit à la demande des rédacteurs de la Revue du Barreau canadien et publié dans cette revue au Volume 34, 1956, pp. 898-938. L'article est intitulé "Rehearing in American Appellate Courts", mais il s'applique tout aussi bien au droit canadien. Inutile de rappeler que la

"Rehearing in American Appellate Courts" but actually it goes into Canadian law as well. Needless to say the Board is not bound by an article however learned its authors may be. However, the Article referred to is worthy of a careful reading and gives ample food for thought.

The article gives some examples of instances in which a court might re-open to re-hear.

- Where the Court has overlooked, misapplied or failed to consider a statute, decision or principle;
- Where the Court has overlooked or misconceived some material fact;
- Where the Court has overlooked or misconceived a material question in the case;
- Where there is serious doubt over the validity of correctness of precedent relied upon and the case itself is of great precedent potential or of grave public interest. (p. 908)

On page 910 one can read that "There is general agreement that rehearing will not be granted merely for the purpose of again debating matters on which the court has once deliberated and spoken - on this rules, cases and justices speak with one voice." One may say that this is only common sense in common law - to coin a phrase - and the Board will not raise a dissenting note in that concert of voices, for it is obvious that any appellate court would not re-open just to give another day in court to a dissatisfied plaintiff or to a frustrated lawyer. When an appeal has been fully heard and judgment pronounced a Court will not grant leave to re-open except under very special circumstances, almost compelling, which will warrant such a recourse with the view that the ends of justice are fully met, and for the proper discharge of judicial function. The onus to show those very special circumstances, rests upon the party who is seeking re-opening and although it could be a very heavy one, nothing bars anyone in trying to get relief. Finally it would seem from the reading of the article already referred to that re-hearings are not granted when the object of the motion is to obtain a "re-statement" and one which would not change the practical result of the decision.

Now if one turns to page 913 of the article one will read: "We already adverted to four general grounds which appear in the rules and statutes and are supported by letters from the several appellate courts and their decisions. In addition to these, cases have granted rehearing to cure defects of parties or where one of the parties made no appearance because of lack of notice, where the party who appealed had no appealable interest, and to amend an inadvertent confusion in the mandate." The phrase "lack of notice" could mean in the Board's opinion where notice has not been sent, has not been served, has not been properly served or has not been duly received.

In their conclusion the authors say: "Rehearing in theory is a conscientious judicial effort to make the appellate process as good as it can be.... The real quality of rehearing is (thus) a function of the quality of the judges."

Commission n'est pas tenue par un article, même si ses auteurs sont très savants. Cependant, l'article mentionné mérite une lecture attentive et il fournit ample matière à réflexion.

L'article donne des exemples de cas où une cour pourrait consentir à une nouvelle audition ou à une réouverture d'instance.

- lorsque la Cour a négligé ou mal appliqué une loi, une décision ou un principe, ou n'en a pas tenu compte;
- lorsque la Cour a négligé ou mal interprété un fait important;
- lorsque la Cour a négligé ou mal interprété une question de fond dans l'affaire;
- lorsque la validité ou la rectitude du précédent sur lequel on s'est fondé est sérieusement mis en doute et lorsque l'affaire elle-même peut devenir un précédent important ou peut avoir d'importantes répercussions sur l'intérêt public. (p. 908).

A la page 910, il est dit que: "There is general agreement that rehearing will not be granted merely for the purpose of again debating matters on which the court has once deliberated and spoken - on this rules, cases and justices speak with one voice." On peut dire, si on nous prête l'expression, qu'il ne s'agit là que d'appliquer le sens commun au Common law, et la Commission ne s'opposera pas à cette opinion généralement acceptée puisqu'il est évident qu'une cour d'appel ne consentira jamais à une réouverture d'instance simplement pour permettre à un plaignant mécontent ou à un avocat frustré de plaider sa cause une deuxième fois. Lorsqu'une Cour a entendu un appel en entier et qu'elle a prononcé son jugement, elle ne peut permettre la réouverture de l'instance que dans des circonstances très spéciales, presque contraignantes, qui justifient un tel recours à défaut de quoi il ne serait pas possible de rendre pleine justice ou d'exercer convenablement la fonction judiciaire. C'est la partie qui cherche à obtenir la réouverture qui a charge de démontrer l'existence de ces circonstances très spéciales, et même si cette charge est très lourde, tous ont droit à ce recours. Enfin, il semblerait, à la lecture de l'article mentionné plus haut, qu'une réouverture d'instance n'est pas accordée lorsqu'elle fait suite à une requête de reformulation ("re-statement") qui ne modifierait pas la portée pratique d'une décision.

Le passage suivant figure à la page 913 de l'article:

"We already adverted to four general grounds which appear in the rules and statutes and are supported by letters from the several appellate courts and their decision. In addition to these, cases have granted rehearing to cure defects of parties or where one of the parties made no appearance because of lack of notice, where the party who appealed had no appealable interest, and to amend an inadvertent confusion in the mandate."

Having heard the submissions made by both parties and having examined with the greatest care the legal arguments presented by their Counsel as well as the pertinent law, statutes and cases, the Board had come to the following conclusion taking into consideration that the question raised in the present instance is of great significance and importance as it involves the exercise by the Board of its appellate jurisdiction:

1- The Statute governing the Board and which is embodied in the Immigration Appeal Board Act (14-15-16 Elizabeth II, ch. 90) provides in S. 7 that:

- (1) The Board is a court of record and shall have an official seal, which shall be judicially noticed.
- (2) The Board has, as regards the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record....."

and S. 22 provides that:

"Subject to this Act and except as provided in the Immigration Act, the Board has sole and exclusive jurisdiction to hear and determine all questions of jurisdiction, that may arise in relation to the making of an order of deportation"

and S. 14 provides that:

"The Board may dispose of an appeal under section 11 or Section 12 by

- (a) allowing it:
- (b) dismissing it; or
- (c) rendering the decision and making the order that the Special Officer who presided at the hearing should have rendered and made."

Thus an appeal lies to the Board from an order of deportation made by a Special Inquiry Officer. To hear this appeal the Board has all the rights, the powers and the privileges which are vested in a superior court of record and furthermore the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction.

De l'avis de la Commission, l'expression "lack of notice" signifie que l'avis n'a pas été envoyé ou transmis, qu'il n'a pas été transmis convenablement ou qu'il n'a pas été dûment reçu.

Les auteurs affirment ce qui suit dans leur conclusion: "Rehearing in theory is a conscientious judicial effort to make the appellate process as good as it can be... The real quality of rehearing is (thus) a function of the quality of the judges."

Ayant entendu les arguments des deux parties et ayant étudié très attentivement l'argumentation juridique présentée par leurs procureurs ainsi que les points de droit, les lois et la jurisprudence pertinente, la Commission en est arrivée à la conclusion suivante, eut égard au fait qu'il s'agit dans l'instance d'une question très importante puisqu'elle touche à l'exercice de la compétence d'appel attribuée à la Commission.

1- Le statut qui régit la Commission et qui figure dans la Loi sur la Commission d'appel de l'immigration (14-15-16 Elizabeth II, ch. 90) prévoit, à l'article 7, que:

"(1) La Commission est une cour d'archives et doit avoir un sceau officiel dont il est judiciairement pris connaissance.

(2) La Commission a, en ce qui concerne la présence, la prestation de serment et l'interrogatoire des témoins, la production et l'examen des documents, l'exécution de ses ordonnances et autres questions nécessaires ou appropriées à l'exercice régulier de sa compétence, tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archives..."

et l'article 22 prévoit que:

"Sous réserve des dispositions de la présente loi et sauf ce que prévoit la Loi sur l'immigration, la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion ..."

l'article 14 prévoit que:

"La Commission peut statuer sur un appel prévu à l'article 11 ou à l'article 12,

(a) en admettant l'appel

(b) en rejetant l'appel; ou

(c) en prononçant la décision et en rendant l'ordonnance que l'enquêteur spécial qui a présidé l'audition aurait dû prononcer et rendre."

Functus officio, too easily and too often conceived as a doctrine, is merely an expression applied to an agent or donee of an authority who has performed the act authorized, so that the authority is exhausted and at an end. (Bedwell v Wood (1877) 2 Q.B.D. 626). Such an expression does not apply to a superior court, to a court with appellate jurisdiction.

Thus judgments pronounced and decisions rendered by the Board are Res Judicata. However the Board is continuing, its jurisdiction is continuing and before its order is executed nothing precludes or bars an appellant from filing with the Board a motion requesting an order to re-open and it will be for the applicant to show that in his case very special circumstances warrant such an order to re-open. This seems to be what it is meant under Rule 61 of the Rules of the Supreme Court of Canada. The effect of the filing of a motion is only to suspend pro tempore the execution of an order. It is for the Board to pronounce whether the motion is bien fondée or whether the motion is futile and frivolous. What should constitute very special circumstances warranting a re-opening? As it has been said supra the Board has not as yet rules governing the matter but the Board, pursuant to S. 7 and to S. 22 of the Immigration Appeal Board Act has the jurisdiction to pronounce on the matter and such a jurisdiction is inherent and discretionary. Furthermore the Board has an inherent jurisdiction in equity.

Thus the Board has jurisdiction to order the re-hearing of an appeal and having said so, the Board disposed of the first basic issue in this instance.

- 2- Has the applicant showed that there are very special circumstances warranting the exercise by the Board of its inherent and discretionary jurisdiction?

The Board is unable to entertain the submission that its judgment in the appeal of Areti Tsantili is a default judgment or an ex parte judgment. At the hearing on the 22nd day of April 1968, the appellant was not present nor was the respondent and both were not represented although the Respondent had filed with the Board a written submission. The Board proceeded by applying Rule 18 of the Immigration Appeal Board Rules which reads: "If at the time set for the hearing of an appeal neither of the parties thereto is present and no one is present to represent them, the Board may review the Notice of Appeal and the record together with any written submission that may have been made to the Board in respect of the appeal and render its decision thereon".

It has been submitted that the Board has rendered its decision in the ignorance of the marriage or the impending marriage of the appellant. True that at the time of the hearing of the appeal the Board had no information on the marriage. The marriage could constitute a

Ainsi la Commission doit-elle décider en appel d'une ordonnance d'expulsion rendue par un enquêteur spécial. Pour entendre cet appel, la Commission a tous les pouvoirs, droits et privilèges conférés à une cour supérieure d'archives et elle a de plus compétence exclusive pour décider toutes questions de fait ou de droit, y compris les questions de juridiction.

L'expression functus officio est trop souvent et trop facilement interprétée comme une doctrine alors qu'elle ne s'applique qu'à un donataire d'une autorité qui a fait l'acte autorisé de sorte que son autorité est expirée et a pris fin (Bedwell c. Wood, (1877) 2 Q.B.D. 626). Cette expression ne s'applique pas à une Cour supérieure, à une cour dont la juridiction est en appel.

Les jugements prononcés et les décisions rendues par la Commission sont choses figées. Cependant, la Commission demeure, sa juridiction demeure et, avant que son ordonnance soit exécutée, rien n'empêche ou n'exclut qu'un appelant puisse déposer auprès de la Commission une requête visant une ordonnance de réouverture. Il appartiendra alors à l'appelant de démontrer que dans son cas des circonstances très spéciales justifient l'émission d'une telle ordonnance de réouverture. C'est ce que semble signifier la règle 61 des Règles de la Cour suprême du Canada. Le dépôt d'une requête ne fait que suspendre temporairement l'exécution d'une ordonnance. C'est la Commission qui doit décider si la requête est bien fondée ou si elle est futile et purement dilatoire. En quoi peuvent consister les circonstances très spéciales justifiant une réouverture? Comme nous l'avons déjà dit, la Commission n'a pas de règles sur cette question mais les articles 7 et 22 de la Loi sur la Commission d'appel de l'immigration lui reconnaissent la juridiction pour se prononcer sur la question et cette juridiction est inhérente et discrétionnaire. La Commission a de plus une juridiction inhérente en équité.

Ainsi, la Commission a juridiction pour ordonner la réouverture de l'audition de l'appel, et ayant reconnu ce fait, la Commission a tranché la première question fondamentale en litige dans l'instance.

- 2- La requérante a-t-elle démontré qu'il existe des circonstances très spéciales justifiant l'exercice de la juridiction inhérente et discrétionnaire de la Commission?

La Commission ne peut recevoir l'argument que le jugement rendu dans l'appel d'Areti Tsantili était un jugement par défaut ou ex parte. Ni l'appelante ni l'intimé n'assistaient ou étaient représentés à l'audition du 22 avril 1968, quoique l'intimé avait déposé auprès de la Commission une plaidoirie écrite. La Commission a donc appliqué la règle 18 des Règles de la Commission d'appel de l'immigration: "Si, au moment fixé pour l'audition de l'appel, aucune des parties n'est présente, ni aucune personne ne comparaît pour les représenter, la Commission peut étudier l'avis d'appel et le dossier ainsi que les arguments et preuves écrites qui lui ont été faits au sujet de l'appel et rendre une décision."

new fact, could be a material factor but the Board is unable to decide on that matter on the hearing of this motion and the Board is also unable, at this stage to entertain the submission made by the applicant that the Board would not have made an order dismissing the appeal and directing the execution of the deportation order, if it had known the fact of the marriage. This is a matter for the Board to decide pursuant to S. 15 of the Act which gives the Board exclusive discretionary power to stay or quash an order of deportation on compassionate grounds. But such an extraordinary jurisdiction can be exercised only after the Board has exercised its jurisdiction pursuant to S. 15 of the Act. This instance being one of a motion, the marriage at this stage is a secondary issue. The main issue is that the applicant had not received notice of the hearing of her appeal. The applicant has declared in a sworn affidavit that she had not received notice and that consequently, through no fault of hers, she was unable to attend the hearing of her appeal. In the same affidavit the applicant declares "it was always my intention to make representations at the hearing of my appeal." Same intention has been manifested in her Notice of Appeal of the 13th day of February 1968. This affidavit is contradicted by a sworn affidavit of the appellant's former counsel and by two statutory declarations made and signed by two Immigration Officers.

The entirety of this affidavit evidence remains untested and could not have been properly tested at the time of the hearing of this motion. Again, this whole affidavit evidence is in so flagrant contradiction that the only resort to achieve the ends of justice is by way of a thorough and proper testing of such evidence.

For all the reasons given above, the Motion of the Applicant requesting an order to re-open her appeal is granted, and it is hereby directed and ordered that the appeal be re-opened and re-heard at a time and place to be ordered by the Board.

Concurred in by: J.C.A. Campbell and U. Benedetti.

For the applicant: A.F. Brewin, Q.C.;

For the respondent: R. Williams, Barrister and Solicitor.

Il a été dit que la Commission avait rendu sa décision sans être au courant du fait que l'appelante était mariée ou allait se marier. Il est vrai qu'au moment de l'audition de l'appel la Commission n'avait pas pris connaissance de ce mariage. Le mariage pourrait constituer un nouveau fait, un facteur important, mais la Commission est incapable de décider de cette question au cours de l'audition de la requête et elle est incapable pour le moment de retenir l'argument de la requérante selon lequel la Commission n'aurait pas rendu une ordonnance rejetant l'appel et ordonnant l'exécution de l'ordonnance d'expulsion si elle avait connu ce fait du mariage. Il appartient à la Commission de décider de cette question en vertu de l'article 15 de la Loi qui confère à la Commission le pouvoir discrétionnaire exclusif d'annuler une ordonnance d'expulsion ou d'y surseoir pour des motifs de pitié. Mais cette juridiction extraordinaire ne peut s'exercer que lorsque la Commission a exercé la juridiction qui lui est conférée par l'article 14 de la Loi. Puisqu'il s'agit dans l'instance d'une requête, le mariage n'est, à ce stage, qu'une question secondaire. La question fondamentale est que la requérante n'avait pas reçu d'avis d'audition de l'appel. La requérante a déclaré dans un affidavit donné sous serment qu'elle n'avait pas reçu d'avis et que par conséquent, sans faute de sa part, elle n'a pas réussi à assister à l'audition de son appel. Dans le même affidavit, la requérante déclare, "It was always my intention to make representations at the hearing of my appeal." Elle a manifesté la même intention dans son avis d'appel du 13 février 1968. Cet affidavit est contredit par un affidavit donné sous serment par l'ancien conseiller de l'appelante et par deux déclarations statutaires données et signées par deux fonctionnaires à l'immigration.

Toute cette preuve par affidavit n'a pas été examinée et ne pourrait pas être examinée convenablement au moment de l'audition de cette requête. Encore une fois, toute la preuve par affidavit est en contradiction tellement flagrante que la seule façon de rendre justice serait d'examiner en bonne et due forme toute cette preuve.

Pour toutes les raisons données ci-devant, la requête de la requérante demandant la réouverture de son appel est accordée, et la Commission ordonne par les présentes la réouverture de l'appel et une nouvelle audition qui sera tenue en un lieu et en un temps fixés par la Commission.

Ont souscrit: J.C.A. Campbell et U. Benedetti.

Pour la requérante: Me A.F. Brewin, c.r.;
 Pour l'intimé: Me R. Williams.

8.

Georgios MAROUDAS,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the Decision: September 13, 1968;
File: 68-5376

Coram: Miss J.V. Scott, Chairman, J.A. Byrne, Gérard Legaré

Ship desertion - Entry without approval - Conviction - Detaining order while imprisoned. - Best evidence not required to prove arrest and ship's departure - Physical arrest unnecessary - Right at inquiry of prisoner arrested under s. 15(3) as opposed to s. 16 - Right of Immigration Officer to detain - Notice of detention equivalent to arrest - Immigration Act: SS. 13, 15(3), 16, 17, 19(1)(e)(x), 50(b). Authorities and jurisprudence.

Held: Balance of probabilities suffices to determine a ship's departure from Canada - Section 16 of the Act comprehends both physical arrest plus detention and mere detention - Restricting inquiries for a prisoner under S. 15(3) would privilege him in relation to a person arrested under S.16 - Immigration Officer has right to detain equivalent to arrest. Per Scott, Chairman, dissenting: The deportation order against appellant is a nullity since the inquiry held here pursuant to Section 25, and not Sections 23, 24, 19 plus 26, 15 nor 16 plus 25, should have followed not only an arrest but also a detention pursuant to section 16, as Immigration Act is similar to a penal statute, to be strictly construed.

The judgment of the Board was delivered by:

J.A. Byrne:

The order of deportation reads:

- 1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remained in Canada after the departure of the vehicle on which you came into Canada;
- 4) in accordance with subsection (2) of section 19 of the Immigration Act, you are subject to deportation.

8.
Georgios MAROUDAS, appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 13 septembre 1968;
Dossier: 68-5376.

Coram: Mlle J.V. Scott, président, J.A. Byrne, Gérard Legaré.

Desertion d'un navire - Entrée sans autorisation - Condamnation - Ordre de détention durant emprisonnement. - Preuve absolue de l'escale et du départ du navire non requise - Arrestation physique superflue - Droits à l'enquête d'un prisonnier - Droits d'un fonctionnaire à l'immigration d'ordonner détention - Ordonnance de détention équivaut à arrestation - Loi sur l'immigration: Art. 13, 15(3), 16, 17, 19(1)(e)(x), 50(b). - Doctrine jurisprudence.

Arrêt: L'équilibre des probabilités suffit pour déterminer le fait du départ du Canada d'un navire - L'article 16 de la Loi comprend aussi bien l'arrestation physique et la détention que la détention seule - Restreindre l'enquête pour un prisonnier en vertu de l'art. 15(3) l'avantagerait sur une personne arrêtée sans mandat en vertu de l'art. 16 - Le fonctionnaire à l'immigration jouit d'un droit de détention équivalent à une arrestation. Par Scott, président, dissident: L'Ordonnance d'expulsion de l'appellant est nulle puisque l'enquête tenue en l'espèce devait faire suite à détention car la Loi est semblable à un statut pénal et doit s'interpréter rigoureusement.-

Le jugement de la Commission fut rendu par:

J.A. Byrne:

L'ordonnance d'expulsion dit:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (x) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you came into Canada as a member of a crew and, without the approval of an Immigration Officer, remained in Canada after the departure of the vehicle on which you came into Canada;
- 4) in accordance with subsection (2) of section 19 of the Immigration Act, you are subject to deportation.

On or about June 7, 1967, Mr. Maroudas, a 23 year old citizen of Greece and a member of the crew of S.S. Mango left his ship at Carleton-sur-mer, Québec, and proceeded to Montréal where he subsequently took employment and remained. On March 21, 1968, Mr. Maroudas was apprehended by the R.C.M. Police. The following day in Court of Sessions in Montreal he was convicted of violation of subsection (b) of Section 50 of the Immigration Act. Conviction was certified by Exhibit A filed with the Board and dated March 22, 1968. Failing to pay a fine of \$300.00 and cost of \$5.90, he began at once to serve the alternative sentence of three months in prison.

The burden of argument on points of law presented by Counsel for the appellant were in respect of the jurisdiction of the Special Inquiry Officer under Sections 16 and 25 of the Immigration Act and that approval for the subject to remain in Canada after the departure of his ship was implicit in the undertaking that a letter from counsel dated March 29, 1968, to Mr. Pépin, seeking such approval, be admitted to the records of the Special Inquiry Officer hearing (Exhibit E of the Special Inquiry Officer records) and that therefore the appellant was not in violation of subparagraph (x) of paragraph (e) of Section 19 of the Immigration Act.

Principal issues raised by counsel on points of law are as follows:

1. "did the Special Inquiry Officer follow the rules of natural justice in the administrative proceedings to determine the deportability of the appellant;
2. was the decision and deportation order of the Special Inquiry Officer dated May 13, 1968 in accordance with the Inquiries Act, the Canada Evidence Act and the Immigration Act;
3. was the inquiry caused to be held forthwith concerning the appellant, and did the Special Inquiry Officer proceed with reasonable dispatch after he opened the inquiry;
4. did the Special Inquiry Officer, having begun a hearing, have the right to adjourn sine die;
5. did the Special Inquiry Officer conduct the hearing in accordance with accepted procedure; i.e. application of Sections 16 and 23 of the Immigration Act;

Le, ou, aux environs du 7 juin 1967, Mr. Maroudas, citoyen grec âgé de 23 ans, membre d'équipage du navire S.S. Mango ancré à Carleton-sur-mer, Québec a quitté le bord du S.S. Mango et est allé à Montréal où il a occupé un emploi et y est resté. Le 21 mars 1968 la G.R.C. appréhendait M. Madouras. Le jour suivant la Cour des Sessions à Montréal le condamnait pour avoir enfreint l'alinéa (b) de l'article 50 de la Loi sur l'immigration. Le 22 mars 1968, un certificat de condamnation, pièce à l'appui A, a été déposé auprès de la Commission. Pour ne pas avoir payé l'amende de 300 dollars augmentée de \$5.90 de frais, M. Maroudas commença par purger immédiatement l'autre peine de trois mois d'emprisonnement.

Les arguments présentés par le conseiller de l'appelant ont trait à des questions de droit et portent principalement sur la compétence de l'enquêteur spécial aux termes des articles 16 et 25 de la Loi sur l'immigration; il soutient aussi que M. Maroudas a obtenu implicitement l'approbation de rester au Canada après le départ de son bateau du fait que l'on a promis que la lettre adressée par son conseiller à M. Pépin (lettre dans laquelle le conseiller cherchait à obtenir cette approbation) serait versée au dossier de l'enquête tenue par l'enquêteur spécial (pièce à l'appui E du dossier de l'enquête tenue par l'enquêteur spécial) et qu'en conséquence l'appelant n'a pas contrevenu au sous-alinéa (x) de l'alinéa (e) de l'article 19 de la Loi sur l'immigration.

Les principaux litiges, portant sur des points de loi, exposés par le conseiller de l'appelant sont les suivants:

1. "did the Special Inquiry Officer follow the rules of natural justice in the administrative proceedings to determine the deportability of the appellant;
2. was the decision and deportation order of the Special Inquiry Officer dated May 13, 1968 in accordance with the Inquiries Act, the Canada Evidence Act and the Immigration Act;
3. was the inquiry caused to be held forthwith concerning the appellant, and did the Special Inquiry Officer proceed with reasonable dispatch after he opened the inquiry;
4. did the Special Inquiry Officer, having begun a hearing, have the right to adjourn sine die;

6. did the Special Inquiry Officer determine beyond all reasonable doubt that the S.S. Mango had in fact left Canadian waters prior to arrest of the appellant and having failed to do so, could the appellant rightfully be charged under section 19 (1)(e)(x) of the Immigration Act."

In respect of the foregoing points enumerated, 1 to 6, the Board had little difficulty in its conclusions.

1. The transcript of the proceedings of the Special Inquiry seems to indicate the Officer in charge conducted the hearing with decorum, patience, and in accordance with his authority under Section 11 of the Immigration Act;
2. The decision and deportation order were in accordance with the Immigration Act and insofar as they apply with the Inquiries Act and the Canada Evidence Act;
3. The inquiry was held with all due haste under the circumstances, i.e. the detention order directed to the Governor of the Montreal Prison (Exhibit A5 of the records) was made on March 22, the letter of convocation was addressed to Mr. Maroudas March 27, the hearing began April 4.
4. The Board found no reason to question the authority of the Special Inquiry Officer to adjourn the hearing sine die and noted that the records indicate good and sufficient reasons to do so, in order that the "rules of natural justice might obtain";
5. The authority of a Special Inquiry Officer to hold an inquiry while the subject is in a jail will be dealt with in determining the legality of the proceedings;
6. The Board has on several occasions commented on the necessity of proof of the departure of the vessel when a deportation order is based on Section 19(1)(e)(x). In the instant appeal the evidence relating to the departure of the S.S. Mango was in no sense "best evidence". However, from the cumulative effect of the evidence actually before it, the Board may reasonably conclude that the S.S. Mango had in fact departed at the time of the special inquiry. This evidence is as follows:

5. did the Special Inquiry Officer conduct the hearing in accordance with accepted procedure; i.e. application of Sections 16 and 25 of the Immigration Act;
6. did the Special Inquiry Officer determine beyond all reasonable doubt that the S.S. Mango had in fact left Canadian waters prior to arrest of the appellant and having failed to do so, could the appellant rightfully be charged under section 19(1)(e)(x) of the Immigration Act."

Sur ces points la Commission a eu peu de difficultés à arriver à une décision.

1. La transcription du déroulement de l'enquête spécial semble indiquer que l'enquêteur spécial a tenu l'audition, dans les formes, avec patience, dans les limites de l'autorité que lui accorde l'article 11 de la Loi sur l'immigration.
2. La décision et l'ordonnance d'expulsion ont été établies en conformité de la Loi sur l'immigration et de la Loi sur les enquêtes et de la Loi sur la Preuve au Canada dans la mesure où elles relèvent des lois ci-dessus mentionnées.
3. Dans les circonstances, l'enquête a été tenue avec toute la diligence nécessaire, i.e., le 22 mars l'ordonnance de détention était établie et envoyée au Gouverneur de la Prison de Montréal (Pièce à l'appui A5 versée au dossier); le 27 mars l'avis d'appel était adressé à M. Maroudas et le 4 avril l'audition avait lieu.
4. La Commission n'a trouvé aucune raison de mettre en doute l'autorité de l'enquêteur spécial qui a ajourné sine die l'audition; la Commission a remarqué que le dossier fournit des bonnes raisons de le faire afin que les "rules of natural justice might obtain";
5. Lorsque nous traiterons de la légalité de la procédure suivie nous aborderons le litige suivant: l'enquêteur spécial avait-il l'autorité de tenir une enquête à l'égard d'une personne en prison;

- 1) The Crew Index Card filed by the Master of the vessel and dated June 15, 1967. (Exhibit "C" to the minutes of inquiry).
- 2) Telex and letter from Paul Paquet, Secretary, Lacroix Lumber Limited, agents for the ship, stating that the ship left Carleton on June 15, 1967, bound for London, England (Exhibit "D" to the minutes of inquiry).
- 3) Exhibits B and C filed at the hearing before the Board relating to the deposit and recovery thereof made on behalf of the owners of the vessel in respect of Maroudas, pursuant to Section 66 of the Immigration Act.
- 4) The fact that some 10 months had elapsed between the alleged departure of the S.S. Mango and the commencement of the inquiry.

As previously stated Counsel based his appeal, in substance, on the jurisdiction of the Special Inquiry Officer under Sections 16 and 25 of the Immigration Act.

Page 22 of the record of the Appeal Board hearing:

"Mr. Cohen:

Where were you arrested?

(Interjection by Madam Chairman)

Chairman:

Do we care about this?

Mr. Cohen:

Yes, because I say that the Special Inquiry Officer had no jurisdiction because he was not arrested pursuant to Section 16."

Pages 39 and 40 of the record of the Appeal Board hearing:

"Mr. Cohen:

6. Dans plusieurs affaires la Commission a souligné la nécessité de prouver le départ du bateau quand l'article 19(1)(e)(x) fonde l'ordonnance d'expulsion. Dans cette affaire on ne peut pas dire que la preuve relative au départ du bateau constitue la meilleure preuve ("best evidence"). Cependant d'après le poids de la preuve administrée devant elle, la Commission peut à justes raisons déclarer qu'en fait le S.S. Mango était parti à l'époque de l'enquête. Cette preuve comprend:

- 1) La carte indicatrice de l'équipage datée du 15 juin 1967, déposé par l'officier responsable (pièce à l'appui "C" du procès-verbal de l'enquête).
- 2) Câblogramme et lettre de M. Paul Paquet, secrétaire de la compagnie de transport, Lacroix Lumber Ltd., qui a déclaré que le 15 juin 1967 le navire a quitté Carleton à destination de Londres, Angleterre (pièce à l'appui "D" au procès-verbal de l'enquête).
- 3) Preuve à l'appui "B" et "C" déposée auprès de la Commission lors de l'audition; ces preuves montrent que (conformément à l'article 66 de la Loi sur l'immigration) les propriétaires du navire ont déposé à titre de garantie du retour de M. Madouras une somme d'argent qui leurs a été retournée.
- 4) 10 mois se sont écoulés entre le supposé départ du navire et l'ouverture de l'enquête.

Ainsi que nous l'avons déjà mentionné, en substance, le conseil a fondé son appel sur la juridiction de l'enquêteur spécial aux termes des articles 16 et 25 de la Loi sur l'immigration.

A la page 22 de la transcription du procès-verbal de l'audition devant la Commission:

"Mr. Cohen:

Where were you arrested?

(Interjection by Madam Chairman)

That is how he started the inquiry. He did not start with an arrest pursuant to Section 16, he started it with a letter of convocation as if it were a family council. Special inquiries are initiated by the arrest under Section 16 and held forthwith under Section 25 of the Immigration Act. If there is no arrest there is no inquiry. There was an arrest for violation of Section 50(b), remaining in Canada by stealth. There was no arrest for an inquiry as required by Section 16. The key words "for an inquiry", the arrest must be for an inquiry, Section 16 and forthwith thereafter under Section 25 of the Immigration Act, the inquiry must be caused to be held. Now, here after the man was imprisoned and while serving time, there was a letter of convocation - by what authority is there a letter of convocation? Section 16 and Section 25 expressly and clearly state where a person is arrested, not even detained is used, where a person is arrested pursuant to Section 16 an inquiry shall forthwith be held in the margin the word is interpreted as meaning immediate. Now a man is arrested, he is deprived of his liberty. He must be taken immediately, or forthwith, to a Special Inquiry Officer, who shall cause an inquiry to be held forthwith and grant him bail, which is discretionary, and hold the inquiry

Sections 16 and 25 of the Immigration Act read as follows:

Section 16. "Every constable and other peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue of a warrant, order or direction for arrest or detention, arrest and detain for an inquiry or for deportation or both any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii), (viii), (ix) or (x) of paragraph (e) of subsection (1) of section 19."

Section 25. "Where a person is, pursuant to section 15 or 16 arrested with or without a warrant, a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person."

Chairman:

Do we care about this?

Mr. Cohen:

Yes, because I say that the Special Inquiry Officer had no jurisdiction because he was not arrested pursuant to Section 16."

Aux pages 39 et 40 de la transcription du procès-verbal de l'audition:

"Mr. Cohen:

That is how he started the inquiry. He did not start with an arrest pursuant to Section 16, he started it with a letter of convocation as if it were a family council. Special inquiries are initiated by the arrest under Section 16 and held forthwith under Section 25 of the Immigration Act. If there is no arrest there is no inquiry. There was an arrest for violation of Section 50(b), remaining in Canada by stealth. There was no arrest for an inquiry as required by Section 16. The key words "for an inquiry", the arrest must be for an inquiry, Section 16 and forthwith thereafter under Section 25 of the Immigration Act, the inquiry must be caused to be held. Now, here after the man was imprisoned and while serving time, there was a letter of convocation - by what authority is there a letter of convocation? Section 16 and Section 25 expressly and clearly state where a person is arrested, not even detained is used, where a person is arrested pursuant to Section 16 an inquiry shall forthwith be held in the margin the word is interpreted as meaning immediate. Now a man is arrested, he is deprived of his liberty. He must be taken immediately, or forthwith, to a Special Inquiry Officer, who shall cause an inquiry to be held forthwith and grant him bail, which is discretionary, and hold the inquiry

L'article 16 de la Loi dit:

16. Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, ainsi que tout

It must here be noted that in addition to a number of unspecified officials "every Immigration Officer may without the issue of a warrant for arrest or detention, arrest and detain for an inquiry..."

Since the conjunction or is used in respect of the words arrest or detention without the issue of a warrant, in the opinion of the Board the section contemplates either the physical arrest with subsequent detention or merely detention for the purpose of an inquiry if there exists reasonable grounds to suspect that a person is one referred to in subparagraph (vii), (viii), (ix) and (x) of paragraph (e) of subsection (1) of Section 19. "Reasonable grounds" are, in this instance, indisputable since the appellant was serving a sentence in Montreal Jail having been convicted of a violation of Section 50(b) of the Immigration Act upon evidence that he was a person described in subparagraph (x) of paragraph (e) of Section 19(1) of the said Act.

Counsel for the appellant in argument took exception to the conduct of the Court in this action.

Page 21 of the record of the Appeal Board hearing:

Mr. Law, Counsel for the respondent:

Well all I am saying is that the conviction is there. If my friend wanted to appeal it, it was open to appeal and he didn't appeal.

Mr. Cohen:

It could be quashed at any time as an absolute nullity by certiorari.

The Board concludes, however, that this was a matter for determination by the Courts and only incidental to the appeal since the Special Inquiry Officer had established to its satisfaction that the subject was a person referred to in Section 19(1)(e)(x) of the Act.

Counsel for the appellant, both in his initial presentation and his summation argued that the hearing before the Special Inquiry Officer was in contravention of Section 15(3) of the Immigration Act.

"Where the person concerned is an inmate of a penitentiary, gaol, reformatory or prison, the Minister shall, unless he approves of the issue of a warrant or order under subsection (1) or (2), issue an order to the warden, governor or other person in charge thereof commanding him, at the expiration of the sentence or term of imprisonment awarded to such person or at the expiration of his sentence or term of imprisonment as reduced by the operation of a statute or other law or by a valid act of clemency, to detain such

fonctionnaire à l'immigration, peuvent, sans l'émission d'un mandat, d'une ordonnance ou de directives pour l'arrestation ou la détention, arrêter et détenir aux fins d'enquête ou d'expulsion, ou en vue des deux à la fois, toute personne qui, pour des motifs raisonnables, est soupçonnée d'être une personne mentionnée au sous-alinéa (vii), (viii), (ix) ou (x) de l'alinéa e) du paragraph (1) de l'article 19.

L'article 25 de la Loi dit:

25. Lorsqu'une personne est arrêtée avec ou sans mandat, selon l'article 15 ou 16, un enquêteur spécial doit immédiatement faire tenir une enquête à l'égard de cette personne.

Ici nous remarquons qu'en plus des agents non désignés "tout fonctionnaire à l'immigration peut sans l'émission d'un mandat... arrêter et détenir aux fins d'une enquête...".

Puisque la conjonction ou porte sur l'expression "arrestation ou détention sans l'émission d'un mandat", la Commission estime que l'article prévoit soit l'arrestation physique suivie d'une détention soit une forme atténuée de détention aux fins d'une enquête s'il existent des motifs raisonnables de soupçonner que la personne est mentionnée au sous-alinéa (vii), (viii), (ix), et (x) de l'alinéa (e) du paragraph (1) de l'article 19. Dans cette affaire on ne conteste pas "les motifs raisonnables" attendu que l'appelant purgeait une peine d'emprisonnement pour avoir contrevenu à l'article 50(b) de la Loi sur l'immigration; ainsi la preuve montre qu'il est une personne mentionnée au sous-alinéa (x) de l'alinéa (e) de l'article 19(1) de la Loi.

Dans sa plaidoierie le conseiller de l'appelant s'est attaqué à la procédure suivie par la Cour: page 21 de la transcription du procès-verbal de l'audition:

Mr. Law, Counsel for the respondent:

Well all I am saying is that the conviction is there. If my friend wanted to appeal it, it was open to appeal and he didn't appeal.

Mr. Cohen:

It could be quashed at any time as an absolute nullity by certiorari.

person and deliver him to an immigration officer to take into custody and cause him to be detained as the warrant may direct."

Acceptance of such a theory, in the opinion of the Board would inevitably render a person, who, being in violation of subparagraph (vii), (viii), (ix) and (x) of paragraph (e) of subsection 1 of section 19 and otherwise detained, in a privileged position over one who is apprehended or about to be apprehended, only, for violation of this section. In this special situation a report under Section 19 would have to be made to the Director and at his discretion a directive issued for the convocation of an inquiry. On the other hand Section 16 provides the authority to apprehend or detain for a hearing while Section 25, a safeguard against undue detention provides for the immediacy of such proceedings.

In the instant case it must be noted that the appellant, while in fact was serving a three months sentence, his immediate release from prison may have been effected by satisfying the alternative sentence of \$300.00 fine. The directive or writ of detention addressed to the Superintendent of the Prison on the date of conviction therefore became imperative under the terms of Section 16, consequent upon the Immigration Officer receiving the information which provided reasonable grounds to suspect the person referred to, as being in violation of subparagraph (x) of paragraph (e) of subsection 1, Section 19.

Under the terms of Section 15(3) the Immigration Officer would be powerless to act with the expedition contemplated by the authority bestowed under Section 16 and the person described might have once again become a fugitive from the authority charged with the responsibility of enforcing the Immigration Act.

In addition Section 16 unquestionably authorizes an Immigration Officer to "arrest and detain for the purpose of an inquiry". Subsequent to the subject's arrest, conviction and incarceration, Immigration Officer P. de Montigny addressed an order for detention in accordance with the provisions of the Immigration Act to the Governor of Montreal Prison on a form, entered as Exhibit 4(a) of the records. The form #421, prescribed by the Minister, in its notation of sections 13 and 17 of the Immigration Act merely informed the Governor of his duties to detain the person named and that Montreal Prison was "a detention station satisfactory to the Minister".

Sections 13 and 17 read as follows:

"13. Every constable and other peace officer in Canada whether appointed under the laws of Canada or of any province or municipality thereof, and every person in

Cependant la Commission conclut que ceci est du ressort de la Cour, la Commission ne s'y intéresse que puisque l'enquêteur spécial a été convaincu que l'appelant était une personne mentionnée à l'article 19(1)(e)(x) de la Loi.

Le conseiller de l'appelant, durant sa déposition initiale et sa plaidoirie, a soutenu que l'on a procédé à l'audition devant l'enquêteur spécial en contrevenant aux dispositions de l'article 15(3) de la Loi sur l'immigration.

15. (3) Lorsque l'individu en cause est enfermé dans un pénitencier, une geôle, une maison de correction ou une prison, le Ministre doit, sauf s'il approuve l'émission d'un mandat ou d'une ordonnance aux termes du paragraphe (1) ou (2), décerner un ordre au préfet ou à la personne ayant la direction de ce pénitencier, de cette geôle, de cette maison de correction ou de cette prison, lui enjoignant, à l'expiration de la sentence ou de la durée d'emprisonnement infligée.

La Commission estime que soutenir une telle théorie avantagerait une personne détenue pour avoir enfreint les sous-alinéa (vii), (viii), (ix) et (x) de l'alinéa (e) du paragraphe (1) de l'article 19 sur une personne appréhendée ou sur le point de l'être (donc non détenue) pour avoir contrevenu à l'article. Dans cette situation un rapport prévu à l'article 19 devrait être établi et envoyé au directeur qui juge si la tenue d'une enquête s'impose. Par contre l'article 16 confère l'autorité d'appréhender ou de détenir aux fins d'audition, alors que l'article 25, afin de se prémunir des détentions abusives, stipule que l'enquête doit être tenue immédiatement.

Dans cette affaire on doit noter que bien que l'appelant ait purgé une peine de trois mois de prison, il aurait pu être libéré immédiatement en versant les trois cents dollars d'amende. A la date de la condamnation, l'ordonnance de détention adressée au Gouverneur de la Prison devient aux termes de l'article 16 une charge majeure sur laquelle l'enquêteur spécial s'appuie quand il reçoit des renseignements qui lui fournissent des motifs raisonnables de soupçonner que la personne mentionnée a enfreint le sous-alinéa (x) de l'alinéa (e) du paragraphe 1 de l'article 19.

Aux termes de l'article 15(3) il ne pourrait pas agir avec la célérité prévue par l'article 16 et la personne décrite pourrait encore une fois échapper à l'autorité chargée de faire respecter la Loi sur l'immigration.

immediate charge or control of an immigration station shall, when so directed by the Minister, Deputy Minister, Director, a Special Inquiry Officer or an immigration officer, receive and execute, according to the tenor thereof, any written warrant or order made under the authority of this Act or the regulations for the arrest, detention or deportation of any person."

"17. Any person respecting whom an inquiry is to be held or a deportation order has been made may be detained pending inquiry, appeal or deportation at an immigrant station or other place satisfactory to the Minister."

Moreover, while a majority of the Board were prepared to concede that actual physical arrest had not taken place it is also of the opinion that the two verbs, "arrest" and "detain" are indeed synonymous. In any event and in this instance, the detention order made by Immigration Officer P. de Montigny under Section 16 implied an arrest and therefore Section 25 became applicable.

In support of such a contention we draw on Black's Law Dictionary definition of "detain" and Corpus Juris Secundum, 26A, in respect of "detainer".

"Detain: It has been said that the word "detain" is susceptible of many shades of meaning, and that the idea of force or even duress, threat, or menace can all be easily excluded and the word still be pregnant of meaning. The word includes the idea of delaying, hindering, retarding, etc., and is defined as meaning to hold or keep in custody; to restrain from proceeding; to arrest; to check; to delay; to hinder; to retard; to stay; to stop. "Detain" has been held synonymous with "retain" and, in the participial form applied to real estate, substantially synonymous with "withholding".

"Detainer. The act, or the juridical fact, of withholding the possession of land or goods from a person lawfully entitled thereto; or the restraint of a man's personal liberty against his will; detention. Also a writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. The term is also employed to denote one who has or possesses a thing in the name of another, as a pawnbroker, a depository, and others who may resort to the courts against those who disturb their detention."

De plus, il est évident que l'article 16 permet à un fonctionnaire à l'immigration "d'arrêter et de détenir au fin d'une enquête". Après l'arrestation du sujet, sa condamnation et son incarcération, M. P. de Montigny, fonctionnaire à l'immigration, en conformité des dispositions de la Loi sur l'immigration a établi sur une formule une ordonnance de détention adressée au Gouverneur de la Prison de Montréal; cette ordonnance a été versée au dossier en pièce à l'appui 4(a). La formule 421 prescrite par le Ministre réfère aux articles 13 et 17 de la Loi sur l'immigration et ne faisait qu'informer le Gouverneur de l'obligation qu'il avait de détenir la personne désignée et que la prison de Montréal est "une station d'immigrants ou un autre endroit que le Ministre juge satisfaisant".

L'article 13 dit:

13. Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, de même que toute personne ayant la direction ou le contrôle immédiat d'une station d'immigrants doivent, s'ils en sont requis par le Ministre, le sous-ministre, le directeur, un enquêteur spécial ou un fonctionnaire à l'immigration, recevoir et exécuter, selon la teneur, tout mandat ou toute ordonnance, rendue par écrit sous l'autorité de la présente loi ou des règlements, en vue de l'arrestation, de la détention ou de l'expulsion de quelque personne.

L'article 17 dit:

17. Toute personne, à l'égard de laquelle une enquête doit être tenue ou une ordonnance d'expulsion a été rendue, peut être détenue en attendant l'issue de l'enquête, l'appel ou l'expulsion à une station d'immigrants ou à un autre endroit que le Ministre juge satisfaisant.

En outre, bien que la majorité du coram était disposée à admettre que dans cette affaire l'arrestation physique n'a pas eu lieu, le coram a aussi estimé que les deux verbes "arrêter" et "détenir" sont des synonymes. De toute façon dans cette affaire, l'ordonnance d'expulsion établie en vertu de l'article 16 par M. P. de Montigny, fonctionnaire à l'immigration, implique arrestation, et en conséquence entraîne l'application de l'article 25.

Pour prouver ceci, nous avons examiné la définition de "to detain" proposée par Black's Law Dictionary et celle de "detainer" dans Corpus Juris Secundum 26A:

Within the instant case, a detention notice addressed to the Governor of Montreal Prison in respect of Georgios Maroudas by Inquiry Officer P. de Montigny is admirably suited to such a construction.

The Board has also concluded that the argument that the mere admission into the record of a letter addressed by Counsel to the Inquiry Officer, some ten months subsequent to the departure of the ship, seeking approval to remain in Canada after the departure of the vehicle on which he came, constitutes approval of such request is a spurious argument unworthy of serious consideration.

In view of its findings on the foregoing points, a majority of the Board has reached a conclusion that the deportation order was a valid one and complied fully in "substance", with the terms of the Immigration Act. In the de Marigny V Langlais, Can., (1948) S.C.R. Mr. Justice Kellock said: "In the administration of the Immigration Act what is to be looked for and required is a compliance in substance with its provisions".

The appeal is therefore dismissed.

Notwithstanding, the majority of the Board has come to a conclusion that this is an appropriate case for it to exercise its discretion under the authority given in Section 15(1)(b) to stay the order sine die and request the Department to process the appellant as a sponsored immigrant and report to the Board.

Concurred in by: Gérard Legaré.

J.V. Scott, Chairman (dissenting):

The facts are as follows:

Mr. Maroudas, a 23 year old citizen of Greece, arrived at Carleton-sur-mer, Quebec, on or about June 1, 1967, as a member of the crew of the S.S. Mango. Around June 7, 1967, he left the ship on shore leave and proceeded to Montreal, where he took employment and remained. On March 21, 1968, he was arrested by an officer of the R.C.M.P., and on March 22, 1968, he was convicted in the Court of Sessions at Montreal, as shown on a certificate of judgement dated March 22, 1968, and filed with the Board as Exhibit A-2: "d'avoir ... entre le 15 juin 1967 et le 21 mars 1968, est illégalement demeuré au Canada par la ruse, commettant par là une infraction contrairement à l'article 50(b) de la Loi sur l'immigration, S.R.C. 1952, ch. 325". He was sentenced to a fine of \$300.00 or 3 months imprisonment. He was unable to pay the fine, and the same day, March 22, 1968, commenced serving his sentence in Montreal Prison.

"Detain: It has been said that the word "detain" is susceptible of many shades of meaning, and that the idea of force or even duress, threat, or menace can all be easily excluded and the word still be pregnant of meaning. The word includes the idea of delaying, hindering, retarding, etc., and is defined as meaning to hold or keep in custody; to restrain from proceeding; to arrest; to check; to delay; to hinder; to retard; to stay; to stop. "Detain" has been held synonymous with "retain" and, in the participial form applied to real estate, substantially synonymous with "withholding".

"Detainer. The act, or the juridical fact, of withholding the possession of land or goods from a person lawfully entitled thereto; or the restraint of a man's personal liberty against his will; detention. Also a writ or instrument, issued or made by a competent officer, authorizing the keeper of a prison to keep in his custody a person therein named. The term is also employed to denote one who has or possesses a thing in the name of another, as a pawnbroker, a depository, and others who may resort to the courts against those who disturb their detention."

Dans cette affaire, les définitions s'appliquent parfaitement à l'avis de détention établi par le fonctionnaire à l'immigration contre Georgios Maroudas et adressé au Gouverneur de la Prison de Montréal.

La Commission a aussi conclu que l'argument à l'effet que la simple admission au dossier de la lettre adressée (deux mois après le départ du navire) par le conseiller de l'appelant à l'enquêteur spécial - lettre dans laquelle l'appelant demandait l'autorisation de rester au Canada après le départ du véhicule sur lequel il est venu - constitue l'autorisation demandée est un faux argument qui ne mérite aucune considération sérieuse.

En raison de ses conclusions sur les questions ci-dessus, la majorité du coram a déclaré que l'ordonnance d'expulsion est valide et, quant au fond, en conformité des dispositions de la Loi sur l'immigration. Dans l'affaire de Marigny c. Langlais, Can. (1948) S.C.R. le juge Kellock a déclaré: "In the administration of the Immigration Act what is to be looked for and required is a compliance in substance with its provisions".

En conséquence l'appel est rejeté.

Two documents in identical terms, dated the same day, signed by one P. de Montigny, fonctionnaire à l'immigration, one addressed to Le Directeur, Sûreté Provinciale, 1701 rue Parthenais, Montréal, Qué., and the other to Le Gouverneur, Prison de Montréal, 800 ouest, Boul. Gouin, Montréal, Qué., were filed with the Board as Exhibit A-4. The second of these documents bears the stamp of the Montreal Prison, showing receipt thereof on March 22, 1968. The body of both documents reads as follows:

"En conformité des dispositions de la Loi sur l'immigration, j'ordonne par les présentes que George MAROUDAS soit détenu immédiatement pour une enquête 26-5-45.

date 22 mars 1968 (signed) P. de Montigny
Fonctionnaire à l'immigration

13. 'Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, de même que toute personne ayant la direction ou le contrôle immédiat d'une station d'immigrants doivent, s'ils en sont requis par le Ministre, le sous-ministre, le directeur, un enquêteur spécial ou un fonctionnaire à l'immigration, recevoir et exécuter, selon la teneur, tout mandat ou toute ordonnance, rendue par écrit sous l'autorité de la présente loi ou des règlements, en vue de l'arrestation, de la détention ou de l'expulsion de quelque personne."

15(1) 'Le Ministre peut émettre un mandat pour l'arrestation de toute personne à l'égard de laquelle un examen ou une enquête doit être tenue, ou à l'égard de laquelle une ordonnance d'expulsion a été rendue, en vertu de la présente loi.'

(2) 'Le Ministre, le sous-ministre, le directeur ou un enquêteur spécial peut rendre une ordonnance pour la détention de toute semblable personne, ou en prescrire la détention.'

17. 'Toute personne, à l'égard de laquelle une enquête doit être tenue ou une ordonnance d'expulsion a été rendue, peut être détenue en attendant l'issue de l'enquête, l'appel ou l'expulsion à une station d'immigrants ou à un autre endroit que le Ministre juge satisfaisant.'

FORMULE PRESCRITE PAR LE MINISTRE DE LA MAIN-D'OEUVRE ET DE L'IMMIGRATION"

Nonobstant la décision précédente, la majorité du coram est d'avis que dans cette affaire la Commission doit exercer son pouvoir discrétionnaire aux termes de l'article 15(1)(b) qui prévoit une suspension d'ordonnance sine die; la Commission demande au Ministère de considérer l'appelant comme un immigrant parrainé et elle lui demande de faire un rapport.

A souscrit: Gérard Legaré

Mlle J.V. Scott, président (dissident)

Dans cette affaire les faits sont les suivants:

M. Maroudas est un citoyen grec âgé de 23 ans; vers (ou) le 1^{er} juin il est arrivé à Carleton-sur-mer, Province de Québec, en tant que membre de l'équipage du S.S. Mango. Vers le 7 juin 1967, il a quitté le bord du navire, est allé à Montréal où il a travaillé et y est resté. Le 21 mars 1968 un agent de la G.R.C. l'arrêta, et le 22 mars 1968 il était condamné par la Cour des Sessions à Montréal; ceci est montré par le certificat de jugement daté au 22 mars 1968 déposé auprès de la Commission comme pièce à l'appui A2 qui dit: "d'avoir ... entre le 15 juin 1967 et le 21 mars 1968, est illégalement demeuré au Canada par la ruse, commettant par là une infraction contrairement à l'article 50(b) de la Loi sur l'immigration, S.R.C. 1952, ch. 325". Il a été condamné à payer une amende de trois cents dollars ou à subir une peine d'emprisonnement de trois mois. Il n'a pas pu payer l'amende, donc le 22 mars 1968 il était envoyé à la prison de Montréal pour y purger sa peine.

En pièce à l'appui A-4 on a déposé auprès de la Commission deux documents portant la même date et rédigés dans des termes identiques; l'un était adressé au Directeur de la Sûreté Provinciale (1701 rue Parthenais, Montréal, Qué.), l'autre au Gouverneur de la Prison de Montréal (800 ouest, Boul. Gouin, Montréal, Qué.). Le second document a été reçu le 22 mars 1968 par la prison de Montréal puisqu'il porte le timbre du pénitencier. Ces deux documents disent:

"En conformité des dispositions de la Loi sur l'immigration, j'ordonne par les présentes que George MAROUDAS soit détenu immédiatement pour une enquête 26-5-45.

date 22 mars 1968 (signed) P. de Montigny
Fonctionnaire à l'immigration

13. 'Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, de même que toute personne ayant la direction ou le contrôle immédiat d'une station d'immigrants doivent, s'ils en sont requis par le Ministre, le sous-ministre, le directeur, un enquêteur spécial ou un fonctionnaire à l'immigration, recevoir et exécuter, selon la teneur, tout mandat ou toute ordonnance, rendue par écrit sous l'autorité de la présente loi ou des règlements, en vue de l'arrestation, de la détention ou de l'expulsion de quelque personne.'

Subsequently, a letter dated March 27, 1968, signed by J. Pépin, Special Inquiry Officer, was sent to the appellant in care of the Governor, Montreal Gaol, 800 Gouin Blvd West, Montréal, Qué., in the following terms:

"Dear Sir:

Please be advised that you are presently detained pursuant to Section 16 of the Immigration Act in that it is alleged that you are a person described under sub-paragraph (x) of paragraph (e) of sub-section (1) of Section 19 of the Immigration Act by reason of the fact that you came into Canada as a member of a crew and without the approval of an Immigration Officer remained in Canada after the departure of the vehicle on which you came into Canada.

In view of the above and in accordance with Section 25 of the Immigration Act a Special Inquiry Officer shall hold an Inquiry in your case and will question you in regards to the above allegations. The date and time set for this Inquiry to be held is 9:30 A.M. on Thursday, April 4, 1968. If the Special Inquiry Officer establishes during the Inquiry that you are a person described as above an order for deportation may be made against you.

In accordance with subsection (2) of Section 27 of the Immigration Act any person who is the subject of an Inquiry under the said Act has the right to be represented by counsel at the Inquiry. Attached hereto please find a notification informing you of your rights to counsel.

When you present yourself before the Special Inquiry Officer please carry this letter as well as the attached notification.

We have been given to understand that you have a girl friend in Canada who has contacted Me B.B. Cohen, Advocate, to submit representations on your behalf therefore by copy of this letter Me Cohen is being informed of the date and time set for this Inquiry.

Yours truly,

J. Pépin (signed)
Special Inquiry Officer,
Canada Immigration Division."

This letter was filed as Exhibit B to the Minutes of Inquiry.

On April 4, 1968, Mr. Florian Vallée commenced the inquiry at Montreal Gaol, and stated (at page 2 of the Minutes of inquiry) "Mr. Maroudas, you are detained for an Inquiry pursuant to Section 16 of the Immigration Act which states that:

15(1) 'Le Ministre peut émettre un mandat pour l'arrestation de toute personne à l'égard de laquelle un examen ou une enquête doit être tenue, ou à l'égard de laquelle une ordonnance d'expulsion a été rendue, en vertu de la présente loi.'

(2) 'Le Ministre, le sous-ministre, le directeur ou un enquêteur spécial peut rendre une ordonnance pour la détention de toute semblable personne, ou en prescrire la détention.'

17. 'Toute personne, à l'égard de laquelle une enquête doit être tenue ou une ordonnance d'expulsion a été rendue, peut être détenue en attendant l'issue de l'enquête, l'appel ou l'expulsion à une station d'immigrants ou à un autre endroit que le Ministre juge satisfaisant.'

FORMULE PRESCRITE PAR LE MINISTRE DE LA MAIN-D'OEUVRE ET DE L'IMMIGRATION"

Subséquentement, une lettre datée du 27 mars 1968, signée par M. J. Pépin, enquêteur spécial, était envoyée à l'appelant; cette lettre portait l'adresse suivante: M. Maroudas aux bons soins du Gouverneur de la Prison de Montréal, 800 ouest Boul. Gouin, Montréal, Québec. Cette lettre disait:

"Dear Sir:

Please be advised that you are presently detained pursuant to Section 16 of the Immigration Act in that it is alleged that you are a person described under sub-paragraph (x) of paragraph (e) of sub-section (1) of Section 19 of the Immigration Act by reason of the fact that you came into Canada as a member of a crew and without the approval of an Immigration Officer remained in Canada after the departure of the vehicle on which you came into Canada.

In view of the above and in accordance with Section 25 of the Immigration Act a Special Inquiry Officer shall hold an Inquiry in your case and will question you in regards to the above allegations. The date and time set for this Inquiry to be held is 9:30 A.M. on Thursday, April 4, 1968. If the Special Inquiry Officer establishes during the Inquiry that you are a person described as above an order for deportation may be made against you.

In accordance with subsection (2) of Section 27 of the Immigration Act any person who is the subject of an Inquiry under the said Act has the right to be represented by counsel at the Inquiry. Attached hereto please find a notification informing you of your rights to counsel.

"Every constable and other peace officer in Canada whether appointed under the laws of Canada or of any province or municipality thereof, and every Immigration Officer may, without the issue of a warrant, order or direction for arrest or detention arrest and detain for an Inquiry or for deportation or both, any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii) (viii) (ix) or (x) of paragraph (e) of subsection (1) of section 19".

- Mr. Maroudas, section 25 of the Immigration Act requires that when a person has been detained under these circumstances that an Inquiry be held immediately. I am now going to hold such an Inquiry and the specific section of the Act which I will consider in connection with your case is section 19(1)(e)(x) of the Immigration Act which refers to persons who are not Canadian citizens or persons who do not have Canadian domicile and who

"came into Canada as a member of a crew and, without the approval of an Immigration Officer, remain in Canada after the departure of the vehicle on which they came into Canada" and I paraphrase "Such a person is subject to deportation".

Further reference to these sections was made by the Special Inquiry Officer at the adjourned inquiry, on April 16, 1968 (see pp 7 & 8 of the Minutes). The inquiry was further adjourned and hearings also took place on May 6, 9 and 13. The Deportation Order was made May 13, 1968; at which time Mr. Maroudas was still serving his sentence in Montreal jail. He was released on June 7, 1968, having served his sentence in full.

On May 13, 1968, just before rendering his decision, Mr. Vallée was asked by Me Cohen, counsel for Mr. Maroudas:

BY COUNSEL:

- Would you complete an application for financial assistance and an application for bail pending appeal?

BY SPECIAL INQUIRY OFFICER

- I would like to explain to you, Me Cohen and Mr. Georgios Maroudas, that in order that your application for release from detention could be considered by the Immigration Appeal Board, that you must submit a written submission. Furthermore, I would like to inform you that

When you present yourself before the Special Inquiry Officer please carry this letter as well as the attached notification.

We have been given to understand that you have a girl friend in Canada who has contacted Me B.B. Cohen, Advocate, to submit representations on your behalf therefore by copy of this letter Me Cohen is being informed of the date and time set for this Inquiry.

Yours truly,

J. Pépin (signed)
Special Inquiry Officer,
Canada Immigration Division".

Cette lettre a été déposée en pièce à l'appui B au procès-verbal de l'enquête.

Le 4 avril 1968, M. Florian Vallée ouvrait l'enquête à la Prison de Montréal et déclarait:

(at page 2 of the Minutes of inquiry) "Mr. Maroudas, you are detained for an Inquiry pursuant to Section 16 of the Immigration Act which states that:

"Every constable and other peace officer in Canada whether appointed under the laws of Canada or of any province or municipality thereof, and every Immigration Officer may, without the issue of a warrant, order or direction for arrest or detention arrest and detain for an Inquiry or for deportation or both, any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii) (viii) (ix) or (x) of paragraph (e) of subsection (1) of Section 19".

- Mr. Maroudas, section 25 of the Immigration Act requires that when a person has been detained under these circumstances that an Inquiry be held immediately. I am now going to hold such an Inquiry and the specific section of the Act which I will consider in connection with your case is section 19(1)(e)(x) of the Immigration Act which refers to persons who are not Canadian citizens or persons who do not have Canadian domicile and who

"came into Canada as a member of a crew and, without the approval of an Immigration Officer, remain in Canada after the departure of the vehicle on which they came into Canada" and I paraphrase "Such a person is subject to deportation"."

your written submissions must be accompanied by an IAB form 48. At the expiration of the sentence of Mr. Maroudas at the present Montreal Gaol he will be then detained by Immigration authorities and only at that time that his application to be released pending the outcome of his appeal will be considered because when he will be released from Montreal Gaol he will be then transferred to our services meaning the Immigration services for detention and his bail to be released is hereby denied for the following reasons: 1) that he had not surrendered voluntarily but had to be apprehended; 2) that he has no relatives in Canada; 3) if released from custody he might abscond."

Mr. Maroudas was released by the Immigration authorities after signature of a Bond for conditional release by his fiancée, Miss Bernice Chandler, dated June 7, 1968.

Me Cohen argued before the Board, among other things, that the inquiry, and by implication, the deportation order, were null and void. He stated: "Special inquiries are initiated by the arrest under Section 16 and held forthwith under Section 25 of the Immigration Act. If there is no arrest for violation of Section 50(b) remaining in Canada by stealth. There was no arrest for an inquiry as required by Section 16. The key words "for an inquiry", the arrest must be for an inquiry, Section 16 and forthwith thereafter under Section 25 of the Immigration Act, the inquiry must be caused to be held. Now, here after the man was imprisoned and while serving time, there was a letter of convocation - by what authority is there a letter of convocation?" Mr. Law, counsel for the respondent, stated in reply to this argument: "Now the Special Inquiry Officer conducted this inquiry on the ground that the appellant was detained pursuant to Section 16 of the Immigration Act and the inquiry was conducted in accordance with Section 25. Perhaps the more appropriate procedure to have followed would have been for some proper person to make a report under Section 19 of the Immigration Act but I do not think it can be seriously contended that the appellant was in any way jeopardized by the method by which the inquiry was convened. The fact is that the appellant was in jail which is not an impediment to holding an inquiry and I submit that it, shall we say rather perhaps unusual approach in this case, in no way vitiates the order which was ultimately made. Now,...

CHAIRMAN:

You are saying the inquiry is not a nullity merely because the thing that activated it was possibly improper?

MR. LAW:

That is right. The fact is the man was in jail as indicated and possibly

Le 16 avril 1968, jour de l'ajournement de l'enquête, l'enquêteur spécial a encore cité ces deux articles (voir pp. 7-8 du procès-verbal). L'enquête a de nouveau été ajournée, et des auditions eurent lieu le 6, 9 et 13 mai. L'ordonnance d'expulsion a été rendue le 13 mai 1968; à cette époque M. Maroudas purgeait encore sa peine à la prison de Montréal. Le 7 juin 1968 il était libéré après avoir purgé sa peine intégrale.

Le 13 mai 1968, M. Cohen, conseiller de M. Maroudas interrogeait M. Vallée, enquêteur spécial; ceci se passait juste avant l'établissement de la décision par l'enquêteur spécial:

BY COUNSEL:

- Would you complete an application for financial assistance and an application for bail pending appeal?

BY SPECIAL INQUIRY OFFICER

- I would like to explain to you, Me Cohen and Mr. Georgios Maroudas, that in order that your application for release from detention could be considered by the Immigration Appeal Board, that you must submit a written submission. Furthermore, I would like to inform you that your written submissions must be accompanied by an IAB form 48. At the expiration of the sentence of Mr. Maroudas at the present Montreal Gaol he will be then detained by Immigration Authorities and only at that time that his application to be released pending the outcome of his appeal will be considered because when he will be released from Montreal Gaol he will be then transferred to our services meaning the Immigration services for detention and his bail to be released is hereby denied for the following reasons: 1) that he had not surrendered voluntarily but had to be apprehended; 2) that he has no relatives in Canada; 3) if released from custody he might abscond."

Le 7 juin 1968 les autorités de l'immigration ont relâché M. Maroudas après avoir obtenu la signature de Mlle Bernice Chandler (fiancée de l'appelant) sur le cautionnement de libération conditionnelle.

Entre autre choses Me Cohen a soutenu devant la Commission que l'enquête et par voie de conséquence l'ordonnance d'expulsion, sont nulles et non avenues. Il a déclaré:

a report under Section 19 might have been the more appropriate action to take. The fact is that the Special Inquiry Officer, who I understand from my friend is named Pépin, wrote a letter informing Mr. Maroudas that he was being detained under Section 16 and if he had originally been free he could have been detained under that section no doubt.

CHAIRMAN:

But he was not.

MR. LAW:

He was informed that he was being detained in prison under Section 16.

CHAIRMAN:

I think this goes to the root of the whole thing. The Special Inquiry Officer has general powers under Section 11 but something has to start the inquiry, it is either a 19 report, 23 report, arrest under 15, or arrest under 16.

MR. LAW:

Yes, and I am saying that what the Special Inquiry Officer has done, he has said to the man who is in jail and who is in any event being already detained, that he is now being detained in effect, not only pursuant to the jail sentence which he is under but also pursuant to the provisions of the Immigration Act. Now I would like to refer the Board to In re JANOCZKA, (1932) 3 W.W.R., page 29, which is a decision of the Manitoba Court of Appeal. Mr. Justice Robson referred to Section 42 of the Immigration Act as it then was. Now Section 42 reads as follows; or read as follows, at that time:

"Upon receiving a complaint from any officer or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or Deputy Minister may order such person to be taken into custody and detained at an immigration station for examination and an investigation of the facts alleged in the said complaint to be made by a board of inquiry or by an officer acting as such."

And then at page 31 of the report, Mr. Justice Robson said:

"I read the words authorizing detention at an immigration station as being authority to detain where the immigrant is not already under detention and as not applying to the case of a person already being an inmate of a jail."

"Special inquiries are initiated by the arrest under Section 16 and held forthwith under Section 25 of the Immigration Act. If there is no arrest for violation of Section 50(b) remaining in Canada by stealth. There was no arrest for an inquiry as required by Section 16. The key words "for an inquiry", the arrest must be for an inquiry, Section 16 and forthwith thereafter under Section 25 of the Immigration Act, the inquiry must be caused to be held. Now, here after the man was imprisoned and while serving time, there was a letter of convocation - by what authority is there a letter of convocation?" Mr. Law, counsel for the respondent, stated in reply to this argument: "Now the Special Inquiry Officer conducted this inquiry on the ground that the appellant was detained pursuant to Section 16 of the Immigration Act and the inquiry was conducted in accordance with Section 25. Perhaps the more appropriate procedure to have followed would have been for some proper person to make a report under Section 19 of the Immigration Act but I do not think it can be seriously contended that the appellant was in any way jeopardized by the method by which the inquiry was convened. The fact is that the appellant was in jail which is not an impediment to holding an inquiry and I submit that it, shall we say rather perhaps unusual approach in this case, in no way vitiates the order which was ultimately made. Now, ...

CHAIRMAN:

You are saying the inquiry is not a nullity merely because the thing that activated it was possibly improper?

MR. LAW:

That is right. The fact is the man was in jail as I indicated and possibly a report under Section 19 might have been the more appropriate action to take. The fact is that the Special Inquiry Officer, who I understand from my friend is named Pépin, wrote a letter informing Mr. Maroudas that he was being detained under Section 16 and if he had originally been free he could have been detained under that section no doubt.

CHAIRMAN:

But he was not.

MR. LAW:

He was informed that he was being detained in prison under Section 16.

CHAIRMAN:

I think this goes to the root of the whole thing. The Special Inquiry Officer has general powers under Section 11 but something has to start the inquiry, it is either a 19 report, 23 report, arrest under 15, or arrest under 16.

I submit, under these circumstances, the letter, I suppose, is almost redundant but what the Immigration Officer has done in this case was attempt to retain, or detain, the appellant while he is already under detention. In any event, the de MARIGNY v. LANGLAIS, (1948) S.C.R., Mr. Justice Kellock said:

"In the administration of the Immigration Act what is to be looked for and required is a compliance in substance with its provisions"

The case SAMEJIMA v REX shows that "this court will not hesitate to condemn hugging-mugger proceedings as Sir Lyman Duff called them or proceedings which have a defect in substance or in which a defect in substance appears." Now I submit there is no defect in substance insofar as this inquiry was concerned. The fact is the appellant was in jail, he was told that an inquiry was going to be conducted, he was not going any place for three months and he had counsel present at all times. He was told precisely what the inquiry entailed and what would result, or what the result would be, if certain things were found and as is quite apparent from the transcript of the minutes of this inquiry the appellant's interests were energetically being defended and I submit that there is no ground for suggesting that the Special Inquiry Officer did not have jurisdiction."

From a reading of the Immigration Act as a whole, it is clear that despite the general authorization given to a Special Inquiry Officer by Section 11 in respect of inquiries, he has no power to commence an inquiry except pursuant to Section 23, Section 24, Section 19 in conjunction with Section 26, or Section 15 or Section 16 in conjunction with Section 25. The inquiry in the instant case purported to be held pursuant to Sections 16 and 25, above quoted. Section 16 empowers an immigration officer, among others, without warrant, to "arrest and detain for an inquiry or for deportation or both any person ... referred to in subparagraph ... (x) of paragraph (e) of subsection (1) of Section 19." Section 25 provides that where a person is, pursuant to Section 16, arrested without a warrant, a Special Inquiry Officer "shall forthwith cause an inquiry to be held ..."

It is clear from the evidence before the Board that Mr. Maroudas was not arrested and detained for an inquiry. He was arrested, detained, charged, and convicted for an offence under the Immigration Act, namely that described in Section 50(b) thereof.

The wording "arrest and detain for an inquiry" in Section 16 must be read conjunctively. In Maxwell on Interpretation of Statutes, Eleventh Edition, the learned authors, at page 229, ff, state "to carry out the intention of the legislature, it is occasionally found necessary

MR. LAW:

Yes, and I am saying that what the Special Inquiry Officer has done, he has said to the man who is in jail and who is in any event being already detained, that he is now being detained in effect, not only pursuant to the jail sentence which he is under but also pursuant to the provisions of the Immigration Act. Now I would like to refer the Board to In re JANOCZKA, (1932) 3 W.W.R., page 29, which is a decision of the Manitoba Court of Appeal. Mr. Justice Robson referred to Section 42 of the Immigration Act as it then was. Now Section 42 reads as follows; or read as follows, at that time:

"Upon receiving a complaint from any officer or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or Deputy Minister may order such person to be taken into custody and detained at an immigration station for examination and an investigation of the facts alleged in the said complaint to be made by a board of inquiry or by an officer acting as such."

Ensuite, à la page 31 du rapport, le juge Robson a déclaré:

"I read the words authorizing detention at an immigration station as being authority to detain where the immigrant is not already under detention and as not applying to the case of a person already being an inmate of a jail."

Je prétends que dans cette affaire, la lettre est presque superflue mais qu'ici, l'agent à l'immigration a tenté de détenir (retain or detain) une personne déjà détenue. De toute façon, dans l'affaire de Marigny c. Langlais (1948) S.C.R. le juge Kellock a déclaré:

"In the administration of the Immigration Act what is to be looked for and required is a compliance in substance with its provisions"

L'affaire SAMEJIMA c REX montre que:

" this court will not hesitate to condemn hugger-mugger proceedings as Sir Lyman Duff called them or proceedings which have a defect in substance or in which a defect in substance appears." Now I submit there is no defect in substance insofar as this inquiry was concerned. The fact is the

to read the conjunctions "or" and "and" one for the other ... This substitution of conjunctions, however, has been sometimes made without sufficient reason, and it has been doubted whether some of the cases turning "or" into "and" and vice versa, have not gone to the extreme limit of interpretation ... It has been said that in a penal statute "or" should only be changed into 'and' or vice versa if the result is more favourable to the subject, but there is no rule of law to that effect." Later in the same work, at page 255, we find "Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language." A penal statute is one which imposes a penalty or forfeiture (Osborne's Law Dictionary, Fifth Edition). The consequences of deportation, though possibly not falling directly within this definition, are so serious that in the Board's opinion the Immigration Act should be construed strictly, as if it were a penal statute.

The document signed by Officer de Montigny, dated March 22, 1968, would appear to be meaningless. This purports to be an order that George Maroudas be detained immediately for an inquiry. It makes no mention of Section 16 and since the detention purportedly ordered was not coupled with an arrest under that section, it has no possible relevance to Section 16. If, as appears more likely from the sections quoted at the bottom, the document purports to be an order pursuant to Section 15(2), Officer de Montigny had no authority to make it.

Section 15(2) reads as follows:

"The Minister, Deputy Minister, Director or a Special Inquiry Officer may make an order for the detention of or direct the detention of any such person."

Officer de Montigny, described as "fonctionnaire à l'immigration" does not fall within any of the categories of persons authorized by the subsection to make an order of detention. Furthermore, the use of the words "such person" in Section 15(2) indicates that the subsection must be read in conjunction with Section 15(1), which provides "The Minister may issue a warrant for the arrest of any person respecting whom an examination or inquiry is to be held or a deportation order has been made under this Act." There was no such warrant of arrest in the case before us.

Mr. Pépin's letter of March 27, 1968, and Mr. Vallée's remarks at the beginning of the inquiry, in respect of Sections 16 and 25, cannot be construed as vesting jurisdiction in Special Inquiry Officer Vallée, since such jurisdiction did not in fact exist within the plain meaning of these sections. The purport of Section 16 is clear - it permits the arrest

appellant was in jail, he was told that an inquiry was going to be conducted, he was not going any place for three months and he had counsel present at all times. He was told precisely what the inquiry entailed and what would result, or what the result would be, if certain things were found and as is quite apparent from the transcript of the minutes of this inquiry the appellant's interests were energetically being defended and I submit that there is no ground for suggesting that the Special Inquiry Officer did not have jurisdiction."

Un examen complet de la Loi sur l'immigration révèle clairement qu'en dépit des pouvoirs généraux en matière d'enquête prévus à l'article 11 pour l'enquêteur spécial celui ne peut ouvrir une enquête qu'en vertu de l'article 23, de l'article 24, de l'article 19 joint à l'article 25. Dans cette affaire l'enquête est présentée comme ayant été tenue selon l'article 16 et 15 de la Loi. L'article 16 autorise entre autres personnes, l'enquêteur spécial, non-munie d'un mandat à arrêter et détenir aux fins d'enquête ou d'expulsion, ou en vue des deux à la fois, toute personne ... mentionnée au sous alinéa (vii), (viii), (ix) ou (x) de l'alinéa (e) du paragraphe (1) de l'article 19." L'article 25 prévoit que lorsqu'une personne est arrêtée sans mandat selon l'article 16 l'enquêteur spécial "doit immédiatement faire tenir une enquête ..."

Selon la preuve administrée devant la Commission, il est manifeste que M. Maroudas n'a été ni arrêté ni détenu aux fins d'enquête. Il a été arrêté, détenu, inculpé et condamné pour avoir enfreint la Loi sur l'immigration, plus précisément pour avoir contrevenu à l'article 50 de la Loi.

Le libellé de l'article 16: "arrêter et détenir aux fins d'une enquête" comporte la conjonction ET. Dans Maxwell on Interpretation of Statutes, 11^{ème} Edition, à la page 229 et suivantes, les savants auteurs déclarent:

"to carry out the intention of the legislature, it is occasionally found necessary to read the conjunctions "or" and "and" one for the other ... This substitution of conjunctions, however, has been sometimes made without sufficient reason, and it has been doubted whether some of the cases turning "or" into "and" and vice versa, have not gone to the extreme limit of interpretation ... It has been said that in a penal statute "or" should only be changed into 'and' or vice versa if the result is more favourable to the subject, but there is no rule of law to that effect."

and detention for the purpose of an inquiry of a person not already arrested and detained pursuant to some other provision of the Act or some other statute. This view is supported by the remarks of Robson J. quoted by Mr. Law in respect of a section, generically similar, found in an earlier version of the Act. "I read the words authorizing detention at an immigration station as being authority to detain where the immigrant is not already under detention and as not applying to the case of a person already being an inmate of a jail."

As noted above, the Immigration Act must be strictly construed. The authority designated to administer the Act, namely the Minister and his staff, must follow the correct procedures laid down therein, in commencing, pursuing and concluding an inquiry or further examination which may result in an order for deportation. In the instant case, the inquiry should have been authorized under Section 26 following a report under Section 19(1).

Since neither Section 15 nor Section 16 were applicable in the case of the present appellant, Section 25 is inapplicable. It is clear from the Immigration Act as a whole that a deportation order must be preceded by a properly constituted inquiry (except in certain situations clearly specified by the Act, none of which are relevant here). Since the inquiry in the instant case was not properly constituted, despite the valiant efforts of Messrs. Pépin and Vallée to bring it within the provisions of Sections 16 and 25, the deportation order flowing from it is a nullity, and the appeal must be allowed.

In view of the above finding, it is not necessary to deal with the other legal arguments ably made by counsel for both parties.

Had I been of the opinion that the appeal should be dismissed, I would have agreed with my learned colleagues, Messrs. Byrne and Legaré, that this was an appropriate case for special relief pursuant to the powers given to the Board by section 15 of the Immigration Appeal Board Act as set out in the last paragraph of Mr. Byrne's reasons for judgement.

For the appellant: B. Benno Cohen, Q.C., Barrister and Solicitor;
for the respondent: R.W. Law, Barrister and Solicitor.

Dans le même ouvrage à la page 255 nous trouvons

"Where an enactment may entail penal consequences, no violence must be done to its language to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language."

Un statut pénal impose une punition ou une déchéance de droit. (Osborne's Law Dictionary, 5^{ème} Edition). Les conséquences d'une expulsion bien que possiblement non exprimées directement dans cette définition, sont si sérieuses que la Commission estime que la Loi sur l'immigration doit être interprétée au sens strict, comme s'il s'agissait d'un statut pénal.

Le document daté du 22 mars 1968 et signé par l'agent de Montigny semblerait être sans signification. Ce document a été présenté comme étant une ordonnance à l'effet que Mr. George Maroudas soit immédiatement détenu aux fins d'une enquête. Ce document ne s'appuie pas sur l'article 16 et attendu que la détention présentée comme ayant été précédée par une ordonnance n'a pas été accompagnée d'une arrestation conformément à cet article, le document n'a aucune valeur par rapport à l'article 16. Si, comme il apparaît d'après les articles cités plus bas, il est plus vraisemblable que le document présenté comme étant une ordonnance d'expulsion ait été établi en vertu de l'article 15(2), alors l'agent de Montigny n'avait pas l'autorité de l'établir.

Article 15(2) dit:

"Le Ministre, le sous-ministre, le directeur ou un enquêteur spécial peut rendre une ordonnance pour la détention de toute semblable personne, ou en prescrire la détention."

L'agent de Montigny, décrit comme "fonctionnaire à l'immigration" n'est pas compris aux termes de l'alinéa dans la catégorie des personnes autorisées à rendre une ordonnance d'expulsion. De plus, les mots "semblable personne" utilisés dans l'article 15(2) indiquent que l'on doit lire le deuxième alinéa à la lumière du premier qui stipule: "le Ministre peut émettre un mandat pour l'arrestation de toute personne à l'égard de laquelle un examen ou une enquête doit être tenu, ou à l'égard de laquelle une ordonnance d'expulsion a été rendue en vertu de la présente loi." Dans l'affaire devant nous il n'y a pas eu d'émission de mandat.

La lettre à la date du 27 mars 1968 de M. Pépin et les remarques de M. Vallée à l'ouverture de l'enquête ayant trait aux articles 16 et 25 ne peuvent être interprétées comme conférant juridiction à l'enquêteur spécial (Vallée) puisqu'en fait si l'on s'en tient au sens littéral de ces articles cette juridiction n'existe pas. La signification de l'article 16 est claire: permettre l'arrestation et la détention aux fins d'enquête à l'égard d'une personne qui n'est précédemment ni arrêtée ni détenue aux termes de quelque autre disposition de la présente loi ou statut. Ce point est soutenu par les remarques du juge Robson citées par M. Law relatives à l'article similaire de la version précédente de la présente loi:

"I read the words authorizing detention at an immigration station as being authority to detain where the immigrant is not already under detention and as not applying to the case of a person already being an inmate of a jail."

Ainsi que nous l'avons mentionné plus haut, la Loi sur l'immigration, doit être interprétée rigoureusement. Le Ministre et ses employés, l'autorité désignée pour appliquer la présente loi, doivent suivre la procédure régulière que la loi préconise pour ouvrir, procéder, et fermer une enquête ou une enquête supplémentaire de laquelle peut résulter une ordonnance d'expulsion. Dans cette affaire l'article 26 aurait dû permettre l'enquête et un rapport prévu à l'article 19(1) aurait dû la suivre.

Attendu que cette affaire ne tombait ni sous le régime de l'article 16 ni sous celui de l'article 17, l'article 25 est sans effet. Un examen complet de la Loi sur l'immigration montre clairement qu'une enquête régulièrement menée doit précéder l'ordonnance d'expulsion (sauf dans certaines situations mentionnées par la présente loi; dans cette affaire ces situations ne sont pas pertinentes). Attendu que dans cette affaire l'enquête n'a pas été régulièrement menée, ceci en dépit des efforts de MM. Pépin et Vallée pour l'amener sous le régime de l'article 16 et 25, l'ordonnance d'expulsion subséquente à l'enquête est nulle et l'appel doit être accueilli.

En raison des conclusions ci-dessus, il n'est pas nécessaire de traiter des autres arguments juridiques savamment présentés par les conseillers des deux parties.

Si je m'étais prononcé pour le rejet de l'appel, je me serais rangée à l'opinion des mes savants collègues MM. Byrne et Legaré, à savoir qu'ainsi que l'a précisé M. Byrne dans le dernier paragraphe des motifs du jugement, cette affaire présente des motifs qui demandent à la Commission d'exercer ses pouvoirs discrétionnaires aux termes de l'article 15 de la Loi sur la Commission d'appel de l'immigration afin d'accorder un redressement spécial.

Pour l'appelant: Me B. Benno Cohen, c.r.;
pour l'intimé: Me R.W. Law.

9.
George PATRINOS, appellant,

v.

The Minister of Manpower and Immigration, respondent.

Date of the decision: September 30, 1968;
File: 68-5662.

Coram: J.C.A. Campbell, Vice-Chairman, F. Glogowski, J.A. Byrne

Two orders of deportation - Jurisdiction of the Board to go behind the second order and examine the first order to see if there were grounds to support the first order. - Immigration Act: 19(1)(e)(ix). - Immigration Appeal Board Act: 11, 22.

Held: The Board had jurisdiction to go behind the second order and examine the first order to see if there were grounds to support the first order. On the facts, the first order in the instant appeal was null and void. Section 5(t) of the Immigration Act being totally inapplicable to the circumstances proved, the second order was therefore a nullity, and the appeal was allowed and an order was made pursuant to Section 14(c) of the Immigration Appeal Board Act, entering the appellant as a non-immigrant.

The judgment of the Board was delivered by:

J.C.A. Campbell, Vice-Chairman:

The order of deportation reads:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (ix) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act and that you return to or remain in Canada after a deportation order was made against you at Windsor, Ontario on the 2nd of February 1968 and since no appeal against such order was allowed and were deported or left Canada since you do not have the consent of the Minister contrary to the provision of Section 38 of the Immigration Act;
- 4) you are subject to be deported in accordance with subsection 2 of Section 19 of the Immigration Act."

The relevant facts in the case are not in dispute. The appellant is a Greek citizen by birth on 5 September 1934. He is married and has three children. His wife and family live in Greece. He is a musician and has followed his profession in several countries including the United States and Canada. He applied for permanent residence in the United States but was requested to leave that country. In February 1968 he obtained a contract to work as an entertainer in the Elatos Café in Montreal and a cash bond in the amount of \$500.00 was deposited at that time with the Immigration office in Montreal. When he presented himself

9. George PATRINOS, appellant,

C.

Le Ministre de la Main-d'oeuvre et de l'immigration, intimé.

Date de la décision: le 30 septembre 1968;
Dossier: 68-5662.

Coram: J.C.A. Campbell, vice-président, F. Glogowski, J.A. Byrne

Deux ordonnances d'expulsion. - Compétence de la Commission passer outre la deuxième ordonnance et d'examiner si la première était fondée. - Loi sur l'immigration: 19(1)(e)(ix) - Loi sur la Commission d'appel de l'immigration: Art. 11; 22.

Arrêt: La Commission avait compétence pour passer outre la deuxième ordonnance d'expulsion et de juger du bien fondé de la première. En fait, la première ordonnance était nulle et de nul effet. L'article 5(t) de la Loi sur l'immigration, vue les circonstances pertinentes, ne recevait aucune application et en conséquence, la seconde ordonnance était nulle. Appel accueilli et une ordonnance de recevoir l'appelant au titre de non-immigrant fut émise en vertu de l'article 14(c) de la Loi sur la Commission d'appel de l'immigration.

Le jugement de la Commission fut rendu par:

J.C.A. Campbell, vice président:

L'ordonnance d'expulsion dit:

- 1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile;
- 3) you are a person described under subparagraph (ix) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act and that you return to or remain in Canada after a deportation order was made against you at Windsor, Ontario on the 2nd of February 1968 and since no appeal against such order was allowed and were deported or left Canada since you do not have the consent of the Minister contrary to the provision of Section 38 of the Immigration Act;
- 4) you are subject to be deported in accordance with subsection 2 of Section 19 of the Immigration Act."

at Windsor, Ontario, to seek admission to Canada to fulfil his contract he was refused admission and a deportation order (Exhibit "B") was issued. He did not appeal the deportation order and returned to the United States. Three days later he left the United States for Switzerland.

While he was in Switzerland, the owner of the Athenian Corner Club in Montreal applied for his admission to Canada as an entertainer and deposited a \$500.00 cash bond with the Immigration authorities in Montreal. The contract was approved and the appellant in Switzerland obtained a tourist visa for Canada instead of a visa as an entertainer.

The appellant did not disclose the fact he had previously been ordered deported to either the Canadian authorities in Switzerland or to the Immigration authorities when he arrived at Montreal on 28 March 1968. He was admitted to Canada as a non-immigrant (tourist) under the provisions of Section 7(1)(c) of the Immigration Act until the 28th of June 1968.

Before the expiration of his status as a tourist he applied to the Immigration authorities in Montreal for an extension of his status as an entertainer at which time it was discovered that he had been ordered deported at Windsor, Ontario, in February 1968 and did not have the consent of the Minister as required by Section 38 of the Immigration Act to return to Canada. Section 38 reads as follows:

"38. Unless an appeal against such order is allowed, a person against whom a deportation order has been made and who is deported or leaves Canada shall not thereafter be admitted to Canada or allowed to remain in Canada without the consent of the Minister."

As a result of an Inquiry the appellant was ordered deported on 15 July 1968 under the provisions of Section 19(1)(e)(ix) of the Immigration Act which reads:

"19(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning

- (e) any person, other than a Canadian citizen or a person with Canadian domicile, who
- (ix) returns to or remains in Canada contrary to the provisions of this Act after a deportation order has been made against him or otherwise."

"19(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning

(e) any person, other than a Canadian citizen or a person with Canadian domicile, who

(ix) returns to or remains in Canada contrary to the provisions of this Act after a deportation order has been made against him or otherwise."

Subséquentement à la signification de cette ordonnance d'expulsion, M. Patrinos a interjeté appel devant la Commission.

Le conseiller juridique de l'appelant a contesté la validité et la légalité de l'ordonnance d'expulsion pour les motifs suivants:

- a) l'ordonnance d'expulsion rendue le 2 février 1968 n'était pas valide, en conséquence elle invalide l'ordonnance d'expulsion signifiée le 15 juillet 1968;
- b) le 2 février 1968 il y a eu déni de justice naturelle durant l'enquête complémentaire relative à l'appelant.

Dans sa plaidoirie relative au premier motif, le conseiller allègue qu'à l'époque où l'appelant s'est présenté devant les autorités de Windsor pour y subir un examen, il était un non-immigrant authentique, puisqu'il possédait un contrat de services dûment signé qui montrait qu'en tant qu'artiste il allait se produire au Canada et que son futur employeur avait déposé un cautionnement de 500 dollars en espèces auprès des autorités de l'immigration à Montréal. En outre, la preuve introduite à l'enquête tenue le 17 juillet 1968 (page 9) montre que les autorités n'ont pas demandé à l'appelant de déposer une somme d'argent afin qu'il puisse être admis au Canada. La seule question qu'on lui a posé était: combien d'argent avez-vous sur vous? Sur ce point voici le pertinent interrogatoire:

"Q. Do you recall that the Immigration Officer, who first examined you at Windsor, requested you to deposit money in order for you to be admitted in Canada regardless of the bond that was deposited in your behalf by Mr. Konidas?
A. No, he only asked me how much money I have in my pocket."

Following the issuance of the said deportation order he appealed to the Immigration Appeal Board.

Counsel for the appellant attacked the validity and legality of the deportation order on two grounds:

- (a) That the deportation order dated 2 February 1968 made against the appellant was not valid and consequently the second order of deportation dated 15 July 1968 is also not valid.
- (b) The appellant was denied natural justice at the further examination conducted at Windsor, Ontario, on 2 February 1968.

In support of the first ground appellant's counsel argued that at the time the appellant presented himself and was examined at Windsor, Ontario, he was a bona fide non-immigrant as he had in his possession a properly signed contract of employment showing he was to be employed as an entertainer in Canada and that his proposed employer had deposited the required \$500.00 cash bond with the Immigration authorities in Montreal. Furthermore Section 5(t) of the Immigration Act coupled with Section 67 of the said Act was not a valid ground in the said deportation order of 2 February 1968 and did not apply to the appellant as the Immigration Officer at Windsor who conducted the further examination knew or should have known that a \$500.00 bond was on deposit with the Immigration office in Montreal. Furthermore the evidence adduced at the Inquiry held on 17 July 1968 (Page 9) showed that the appellant had not been asked to deposit any money in order that he might be admitted to Canada. He was only asked how much money he had in his pocket at the time he sought admission. The relevant question and answer is as follows:

- "Q. Do you recall that the Immigration Officer, who first examined you at Windsor, requested you to deposit money in order for you to be admitted in Canada regardless of the bond that was deposited in your behalf by Mr. Konidas?
- A. No, he only asked me how much money I have in my pocket."

Section 5(t) of the Immigration Act reads as follows:

- "5. No person, other than a person referred to in subsection (2) of Section 7, shall be admitted to Canada if he is a member of any of the following classes of persons:
- (t) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders lawfully made or given under this Act or the regulations."

L'article 5(t) de la Loi sur l'immigration dit:

"5. Nulle personne, autre qu'une personne mentionnée au paragraphe (2) de l'article 7, ne doit être admise au Canada si elle est membre de l'une des catégories suivantes:

(t) les personnes qui ne peuvent remplir ni observer, ou qui ne remplissent ni n'observent, quelque condition ou prescription de la présente loi ou des règlements, ou des ordonnances légitimement établies aux termes de la présente loi ou des règlements."

L'article 67 de la Loi sur l'immigration dit:

"67.(1) Le fonctionnaire supérieur de l'immigration à un port d'entrée peut exiger de tout non-immigrant ou de tout groupe ou organisation de non-immigrants arrivant à ce port, le dépôt entre ses mains de la somme d'argent qu'il estime nécessaire comme garantie du départ du Canada, dans le délai qu'il a prescrit comme condition d'entrée, de ce non-immigrant ou de ce groupe ou organisation de non-immigrants.

(2) Lorsque le non-immigrant ou le groupe ou organisation de non-immigrants ne quitte pas le Canada dans le délai prescrit, le fonctionnaire supérieur de l'immigration peut ordonner la confiscation de la somme ainsi déposée, laquelle est dès lors confisquée, et, lorsque la personne ou les personnes en cause quittent le Canada dans le délai prescrit, le montant déposé doit être retourné, moins les frais de détention, d'entretien, de traitement, de transport ou autres subis par Sa Majesté à l'égard de cette personne ou de ces personnes ou de l'une quelconque d'entre elles. "

En deuxième moyen d'appel M. Landry soutient dans cette affaire les règles de justice naturelle ont été violées car lors de l'enquête supplémentaire tenue le 2 février à Windsor, en Ontario, l'appelant s'est vu refusé le droit d'interjeter appel et celui de retenir les services d'un conseiller juridique. L'article 3 du Règlement sur les enquêtes de l'immigration dit:

"3. Au début d'une enquête, si la personne qui fait l'objet de cette enquête est présente, mais n'est pas représentée par un avocat ou autre conseiller, le président de l'enquête doit

Section 67 of the Immigration Act is as follows:

"67(1) The immigration officer in charge at a port of entry may require any non-immigrant or group or organization of non-immigrants arriving at such port to deposit with him such sum of money as he deems necessary as a guarantee that such non-immigrant or group or organization of non-immigrants will leave Canada within the time prescribed by him as a condition for entry.

(2) where the non-immigrant or group or organization of non-immigrants fails to leave Canada within the time prescribed, the immigration officer in charge may order that the sum of money so deposited be forfeited and thereupon it is forfeited and where the person or persons concerned leave Canada within the prescribed time the money deposited shall be returned, less any expenses for detention, maintenance, treatment or transportation or otherwise incurred by Her Majesty respecting such person or persons or any of them."

In support of his second argument, namely that natural justice had been denied the appellant, Mr. Landry argued that the appellant at the further examination held at Windsor, Ontario on 2 February 1968 was denied the right to counsel and also the right to appeal. The right to counsel, he argued, is provided for in Article 3 of the Immigration Inquiries Regulations. That article reads as follows:

- "3. At the commencement of an inquiry where the person in respect of whom the inquiry is being held is present but is not represented by counsel, the presiding officer shall
- (a) inform the said person of his right to retain, instruct and be represented by counsel at the inquiry; and
 - (b) upon request of the said person, adjourn the inquiry for such period as in the opinion of the presiding officer is required to permit the said person to retain and instruct counsel."

As no counsel was present there was no proper inquiry or alternatively if what had taken place could be construed as being an inquiry when it was held illegally. Therefore the deportation order of 2 February 1968 is automatically null, illegal and void. That being so there was no need for the appellant to make a request to the Minister of Immigration for a visa. If the first deportation order (i.e.) 2 February 1968 is null, ab initio, it follows that the second order dated 15 July 1968 is also null and void as it is based upon the first order.

- a) informer ladite personne de son droit de retenir les services d'un avocat ou autre conseiller, de lui donner ses instructions et de se faire représenter par lui à l'enquête; et
- b) à la demande de ladite personne, ajourner l'enquête pour la période qu'il jugera nécessaire, afin de permettre à ladite personne de retenir les services d'un avocat ou autre conseiller et de lui donner ses instruction."

Le défaut de conseiller rend l'enquête irrégulière ou bien, on peut comprendre que ce qui a eu lieu était une enquête, mais alors elle a été tenue illégalement. L'ordonnance d'expulsion du 2 février 1968 est, en conséquence, nulle, illégale et non-avenue. Ainsi l'appelant n'avait pas besoin de déposer sa demande de visa auprès du Ministre de l'immigration. Si la première ordonnance d'expulsion rendue le 2 février 1968 est nulle, ab initio, il s'en suit que la deuxième ordonnance datée du 15 juillet 1968 est aussi nulle et non-avenue puisque fondée sur la première.

Le conseiller de l'appelant a aussi maintenu que chaque fois qu'une ordonnance d'expulsion est censée être émise la personne intéressée a droit à la présence d'un conseiller juridique. Peu importe si l'examen de la personne a lieu lors de l'enquête supplémentaire ou de l'enquête.

Le conseiller de l'appelant a demandé à la Commission de considérer la compétence artistique de l'appelant décrite aux pages 6 et 7 de l'enquête. Enfin, il a demandé que la Commission utilise ses pouvoirs stipulés par l'article 15(1) de la Loi sur la Commission d'appel de l'immigration et qu'elle accorde à l'appelant le droit d'entrée au Canada.

En réponse à ceci le conseiller pour le Ministre a demandé à la Commission d'étudier cette affaire sous l'article 38 et il a allégué que puisque M. Patrinos n'a pas appelé de l'ordonnance du 2 février il n'est plus temps de reconsidérer la validité de celle-ci. De plus, il a soutenu que dans cette affaire la Commission ne devrait pas exercer son pouvoir discrétionnaire car, d'après lui, l'appelant s'est arrêté au Canada mais en réalité il cherchait à entrer aux Etats-Unis. Il a maintenu que le Canada ne doit pas servir de tremplin à cette fin.

La Commission se demande si elle a l'autorité de laisser en suspens l'ordonnance en appel pour étudier l'ordonnance du 2 février afin d'être sûr que la preuve affirme les motifs exposés dans ladite ordonnance.

Counsel for the appellant also contended that whenever a deportation order is likely to be issued the person concerned is entitled to have counsel present. It does not make any difference whether the examination of the person concerned is by way of a further examination or an Inquiry.

Counsel for the appellant drew the Board's attention to the qualifications of the appellant as an entertainer as they appear at pages 6 and 7 of the Inquiry. He referred the Board to its powers under Section 15(1) of the Immigration Appeal Board Act and requested the Board to grant the right of entry to the appellant.

Counsel for the Minister, in rebuttal, referred the Board to Section 38 of the Immigration Act (already referred to) and argued that as the appellant had not appealed the order of 2 February 1968 its validity could not now be re-tried. He submitted further that the Board should not exercise its discretion in this case as, in his understanding, the appellant was seeking admission to the United States and using Canada as a stopping point. He argued that Canada should not be used as a spring-board for such an endeavour.

The first question the Board has to resolve is whether it has the legal authority to go behind the order under appeal and examine the deportation order of 2 February 1968 to ascertain if there was evidence to support the grounds set out in the said order.

The Immigration Appeal Board is a creature of Statute and its powers and jurisdiction must be found within the Statute that created it. Section 22 of the Immigration Appeal Board Act states:

"22. Subject to this Act and except as provided in the Immigration Act, the Board has sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation or the making of an application for the admission to Canada of a relative pursuant to regulations made under the Immigration Act."

The above quoted Section gives the Board the sole and exclusive jurisdiction to hear and determine all questions of fact or law, including questions of jurisdiction, that may arise in relation to the making of an order of deportation. When this section is read in conjunction with Section 11 of the said Act, which reads:

"11. A person against whom an order of deportation has been made under the provisions of the Immigration Act may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact."

La création de la Commission d'appel de l'immigration dépend d'un statut; donc les pouvoirs et la compétence de celle-ci doivent se trouver dans le statut qui l'a créée. L'article 22 de la Loi sur la Commission d'appel de l'immigration stipule:

"22. Sous réserve des dispositions de la présente loi et sauf ce que prévoit la Loi sur l'immigration, la Commission a compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion ou de la présentation d'une demande d'admission au Canada d'un parent conformément aux règlements édictés sous le régime de la Loi sur l'immigration."

L'article cité ci-dessus donne à la Commission compétence exclusive pour entendre et décider toutes questions de fait ou de droit, y compris les questions de juridiction, qui peuvent se poser à l'occasion de l'établissement d'une ordonnance d'expulsion. Si l'on compare cette article avec l'article 11 de la Loi:

"11. Une personne contre qui a été rendue une ordonnance d'expulsion, aux termes des dispositions de la Loi sur l'immigration, peut, en se fondant sur un motif d'appel qui implique une question de droit ou une question de fait ou une question mixte de droit et de fait, interjeter appel à la Commission."

il apparaît que la Commission a la compétence et le droit de laisser en suspens l'ordonnance du 15 juillet 1968 pour considérer et étudier les faits qui ont amené l'établissement de l'ordonnance d'expulsion du 2 février 1968. Bien que les décisions d'une Cour provincial ne limitent pas les pouvoirs de la Commission, il peut être intéressant d'examiner le procédé employé par la Cour du Manitoba dans une affaire quelque peu analogue: King c. Brooks and the Minister of Citizenship and Immigration (1960) 31 W.W.R. 673.

M. King, le requérant, a demandé une ordonnance de certiorari afin de faire reviser les deux ordonnances d'expulsions rendues contre lui respectivement le 9 juin 1958 et le 29 juillet 1959. Le 22 mars 1960 une demande supplémentaire était déposée afin d'obtenir " a better return " et le 21 avril 1960 le juge Monnin ordonnait qu'un retour soit complété par l'annexion du procès-verbal de l'enquête qui expose la preuve introduite et les pièces à l'appui déposées aux enquêtes tenues respectivement le 9 juin 1958 et le 28 et 29 juillet 1959. Les deux ordonnances disaient:

It is apparent the Board has the jurisdiction and is entitled to go behind the deportation order of 15 July 1968 and look at and examine the facts leading up to the making of the deportation order dated 2 February 1968.

While the Appeal Board is not bound by a decision of a Provincial Court it might be helpful to see the approach taken by the Manitoba Courts in a somewhat similar case, that of King v. Brooks and the Minister of Citizenship and Immigration (1960) 31 W.W.R. 673.

King (the applicant) moved for an order of certiorari to review two deportation orders made against him on 9 June 1958 and 29 July 1959 respectively. The order of certiorari was granted by Monnin J., on 25 February 1960. On 22 March 1960 a further application was made for a better return and on 21 April 1960, Monnin J., ordered that the return be completed by including the Minutes of the Inquiry setting out the evidence adduced and the exhibits filed at the Inquiries held on 9 June 1958, and 28 and 29 July 1959. The two orders were as follows:

"Mr. James Larry King or Henry Franklin Romine or Cummins, on the basis of the evidence adduced at this Inquiry I have reached the decision that you may not come into or remain in Canada as of right and that

- (i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under sec. 19(1)(e) (iv) of the Immigration Act in that you were, at the time of your admission to Canada as an immigrant on November 18, 1957, a member of the prohibited class designated by subsec. (d) of sec. 5 of the said Act.

- (iv) you are subject to deportation in accordance with sec. 19 of the Immigration Act.

I hereby order you to be detained and to be deported. Your dependent wife, Norma Jean King, your dependent children, Cheryl Rae, Franklin Hugheston, and Garrison Richard King, and your dependent foster father, Augustus Wendell, are included in this Order for Deportation under the provisions of sec. 37(1) of the Immigration Act.

Q. Mr. King, do you understand what is meant by this decision?

A. Yes.

June 9, 1958.

(Sgd.) A.E. BROOKS,
Special Inquiry Officer."

"Mr. James Larry King or Henry Franklin Romine or Cummins, on the basis of the evidence adduced at this Inquiry I have reached the decision that you may not come into or remain in Canada as of right and that

- (i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under sec. 19(1)(e)
 - (iv) of the Immigration Act in that you were, at the time of your admission to Canada as an immigrant on November 18, 1957, a member of the prohibited class designated by subsec. (d) of sec. 5 of the said Act.
- (iv) you are subject to deportation in accordance with sec. 19 of the Immigration Act.

I hereby order you to be detained and to be deported. Your dependent wife, Norma Jean King, your dependent children, Cheryl Rae, Franklin Hugheston, and Garrison Richard King, and your dependent foster father, Augustus Wendell, are included in this Order for Deportation under the provisions of sec. 37(1) of the Immigration Act.

Q. Mr. King, do you understand what is meant by this decision?

A. Yes.

June 9, 1958.

(Sgd.) A.E. BROOKS
Special Inquiry Officer."

"Mr. King, on the basis of the evidence adduced at this Inquiry I have reached the decision that you may not come into or remain in Canada as of right and that

- (i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under sec. 19(1)(e)
 - (ix) of the Immigration Act in that you returned to, and remain in Canada contrary to the provisions of the Immigration Act after a deportation order has been made against you or otherwise,
- (iv) you are subject to deportation in accordance with sec. 19 of the Immigration Act.

I hereby order you to be detained and to be deported.

Q. Do you understand what is meant by this decision?

A. Yes.

July 29, 1959.

(Sgd.) A.E. BROOKS,
Special Inquiry Officer."

"Mr. King, on the basis of the evidence adduced at this Inquiry I have reached the decision that you may not come into or remain in Canada as of right and that

- (i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under sec. 19(1)(e) (ix) of the Immigration Act in that you returned to and remain in Canada contrary to the provisions of the Immigration Act after a deportation order has been made against you or otherwise,
- (iv) you are subject to deportation in accordance with sec. 19 of the Immigration Act.

I hereby order you to be detained and to be deported.

Q. Do you understand what is meant by this decision?

A. Yes.

July 29, 1959.

(Sgd.) A.E. BROOKS,
Special Inquiry Officer."

Monnin J., in his judgment said, inter alia, "The evidence has now been filed and it was necessary that I peruse it to dispose of the applicant's contention". Further on in his judgment Monnin J., posed the applicant's case in the following words: "Applicant's case rests on whether the order of June 9, 1958, can be quashed or not because if it is found valid the order of July 29, 1959, which is based on the first, is of necessity valid." After reviewing the evidence Monnin J., stated "The order of June 9, 1958, is valid and, therefore, the order of July 29, 1959, based on it is likewise valid."

He therefore dismissed the application for certiorari. An appeal from the decision of Monnin J., was taken to the Manitoba Court of Appeal. On 25 October 1960 the appeal was dismissed.

It can be seen therefore that the Manitoba Court had no hesitation, on a certiorari application, in going behind the second order made against King, i.e., the order of 29 July 1959 and looking at all the circumstances leading up to the making of the first order of 9 June 1958.

In the instant case when the appellant sought admission to Canada on 2 February 1968 at Windsor, Ontario, he was in possession of

Le juge Monnin a déclaré inter alia,

"The evidence has now been filed and it was necessary that I peruse it to dispose of the applicant's contention".

Le juge Monnin a poursuivi et résumé l'affaire en ces termes:

"Applicant's case rests on whether the order of June 9, 1958 can be quashed or not because if it is found valid the order of July 29, 1959, which is based on the first, is of necessity valid."

Suite à la révision de la preuve le juge Monnin a déclaré:

"The order of June 9, 1958, is valid and, therefore, the order of July 29, 1959, based on it is likewise valid."

En conséquence il a rejeté la demande de certiorari. Cette décision a été placée en appel devant la Cour du Manitoba, qui a rejeté l'appel le 25 octobre 1960.

Quant à la demande de certiorari on peut voir que la Cour du Manitoba n'a pas hésité à laisser en suspens la deuxième ordonnance rendue contre M. King le 29 juillet 1959 pour examiner toutes les circonstances qui ont amené l'établissement de la première ordonnance d'expulsion du 9 juin 1968.

Dans cette affaire, le 2 février 1968 à Windsor, Ontario, lorsque l'appelant cherchait à être admis au Canada il possédait un contrat de trois mois pour se produire dans l'établissement le Elatos Café à Montréal; et son futur employeur avait déposé un cautionnement de 500 dollars en espèces auprès des autorités de l'immigration. A l'encontre de l'opinion du conseiller de l'intimé, rien dans la preuve produite à l'enquête n'indique que l'appelant cherchait à entrer au Canada, à y faire une halte (stopping place) afin de retourner aux Etats-Unis.

En conséquence la Commission déclare que l'enquêteur spécial avait manifestement tort quand celui-ci a déclaré dans l'ordonnance du 2 février 1968 "in my opinion you are not a bona fide non-immigrant" et par suite cette partie de ladite ordonnance d'expulsion est invalide.

a three months' contract to work as an entertainer at the Elatos Café in Montreal and his prospective employer had deposited a \$500.00 cash bond with the Immigration authorities in Montreal. There is nothing in the evidence adduced at the Inquiry to support an opinion that the appellant was seeking to use Canada as a "stopping place" in order to return to the United States as was suggested by counsel for the respondent.

Therefore the Board finds that the Special Inquiry Officer was manifestly wrong when he stated in the deportation order of 2 February 1968 that "in my opinion you are not a bona fide non-immigrant" and that portion of the said deportation order is therefore invalid.

The uncontradicted evidence in the Inquiry shows that the appellant was never required or requested to deposit a sum of money in accordance with the provisions of Section 67 of the Immigration Act. He was only asked how much money he had in his pocket (Page 9). The Board finds therefore the second ground set out in the deportation order of 2 February 1968 is also invalid. As both grounds in the said deportation order are invalid the appeal must be and is hereby allowed.

The Board having allowed the appeal for the reasons given above, it is not necessary to deal with the other arguments of counsel for the appellant.

Counsel for the appellant requested the Board to grant the appellant the status of entertainer in Canada. Therefore, pursuant to Section 14 (c) of the Immigration Appeal Board Act, the Board hereby orders that the appellant be permitted to enter and remain in Canada under the provisions of Section 7(1)(g) of the Immigration Act for a period to expire on the 31st day of December 1968.

Concurred in by: F. Glogowski and J.A. Byrne.

For the appellant: M. Landry, Barrister and Solicitor;
for the respondent: D. Kilgour, Barrister and Solicitor.

Dans cette affaire les faits pertinents ne sont pas contestés. L'appelant est un citoyen grec il est né dans ce pays le 5 septembre 1934. Il est marié et a trois enfants. Son épouse et sa famille demeurent en Grèce. Il est musicien et s'est produit dans différents pays y compris le Canada et les E.U. Aux Etats-Unis il a présenté une demande de résidence permanente mais a été sommé de quitter le pays. En février 1968 il a obtenu un contrat pour jouer à Montréal dans l'établissement Elatos Café; à cette époque un cautionnement en espèces d'un montant de 500 dollars a été déposé auprès du bureau de l'immigration à Montréal. Ensuite il s'est présenté à Windsor, Ontario, afin d'entrer au Canada pour respecter son contrat, mais il s'est vu refusé l'admission et une ordonnance d'expulsion (pièce à l'appui "B") a été émise. Il n'a pas appelé de l'ordonnance d'expulsion et est retourné au E.U. Trois jours plus tard il quittait les E.U. pour la Suisse.

Alors que l'appelant était en Suisse le propriétaire de l'établissement the Athenian Corner à Montréal a présenté une demande d'admission au Canada pour M. Patrinos et a déposé en cautionnement de 500 dollars en espèces auprès des autorités de l'immigration de Montréal. Le contrat a été approuvé et l'appelant, alors en Suisse, a obtenu un visa pour le Canada à titre de touriste au lieu d'un visa en tant qu'artiste.

L'appelant n'a révélé qu'il avait été auparavant expulsé ni aux autorités canadiennes en Suisse, ni aux autorités de l'immigration quand il est arrivé à Montréal le 28 mars 1968. Il a été admis au Canada à titre de non-immigrant (touriste) selon les dispositions de l'article 7(1)(c) de la Loi sur l'immigration; la validité de son permis de séjour s'achevait le 28 juin 1968.

Avant l'expiration de son statut de touriste il a demandé aux autorités de l'immigration à Montréal une prorogation de ce status à titre d'artiste; à cet époque, l'on savait qu'il avait été expulsé par les autorités de Windsor, Ontario et qu'il n'avait pas le consentement du Ministre pour être admis au Canada, comme le prescrit l'article 38 de la Loi sur l'immigration. L'article 38 dit:

"38. Sauf lorsqu'un appel d'une telle ordonnance est admis, une personne contre qui une ordonnance d'expulsion a été rendue et qui est expulsée ou quitte le Canada, ne doit pas subséquemment être admise dans ce pays, ou il ne doit pas lui être permis d'y demeurer, sans le consentement du Ministre."

Le 15 juillet 1968, au terme d'une enquête, l'appelant était expulsé selon les dispositions de l'article 19(1)(e)(ix) de la Loi sur l'immigration; cet article dit:

La preuve incontestée produite à l'enquête révèle que l'on a jamais demandé à l'appelant de déposer une somme d'argent comme le prescrit l'article 67 de la Loi sur l'immigration. La seule question qu'on lui a posée se rapportait à l'argent qu'il avait sur lui (page 9). En conséquence la Commission déclare l'invalidité du deuxième motif de l'ordonnance d'expulsion. Puisque les deux motifs de l'ordonnance d'expulsion sont invalides, l'appel par la présente est accueilli.

Ayant accueilli l'appel pour les motifs exposés ci-dessus, la Commission estime qu'il est inutile de traiter des autres arguments présentés par le conseiller de l'appelant.

Le conseiller de l'appelant demande à la Commission d'accorder à l'appelant le statut d'artiste au Canada. Ainsi donc, en vertu de l'article 14(c) de la Loi sur la Commission d'appel de l'immigration, la Commission par la présente ordonne que l'appelant soit autorisé à entrer au Canada et à y rester jusqu'au 31 décembre 1968 selon les dispositions de l'article 7(1)(g) de la Loi sur l'immigration.

Ont souscrit: F. Glogowski et J.A. Byrne.

Pour l'appelant: Me M. Landry;
pour l'intimé: Me D. Kilgour.

10.
 Mark Alexander CHLOROS,
 Charles Dede THOMAS,
 Jerry Wayne BARNES,
 Michael Alfred CARRIEN, appellants,

v.

The Minister of Manpower and Immigration, respondent.

Date of the decision: October 28, 1968;
 File: 68-5799; 68-5800; 68-5819; 68-5820.

Coram: A.B. Weselak, Gérard Legaré, Jean-Pierre Houle

Port of entry - Eluding examination - Immigration complaint and criminal indictment - Duplicity of charges. - Mens rea - Immigration Act, not a penal statute - Immigration Act: 16, 19(1)(e)(vii), 19(2), 25, 50(a) - Immigration Appeal Board Act: 14(b), 15.

Held: Immigration Act complaint and a criminal indictment are not the same, and a duplicity of charges is a criminal matter only. - Immigration Act is not a penal statute, and where the protection of the public interest is involved, and where there is also a penal Section for the same offence in the Act, mens rea is not an essential element.

The judgment of the Board was delivered by:

A.B. Weselak:

Consolidation of appeals in identical terms as follows:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile; and that
- 3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, in that you came into Canada at a place other than a Port of Entry and eluded examination under this Act,
- 4) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act."

The appellants had gathered at Rangely in the State of Maine and had planned, with the aid of maps, the trip to Canada. They left Rangely, approximately fifty miles from Canadian Customs, on August 25, 1968 and obtained a ride from Rangely Airport to Big Falls, Maine. They left Big Falls the same day and spent two days on gravel and bush roads travelling through the bush.

10.

Mark Alexander CHLOROS,
 Charles Dede THOMAS,
 Jerry Wayne BARNES,
 Michael Alfred CARRIEN,

appellants,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 28 octobre 1968;

Dossier: 68-5799; 68-5800; 68-5819; 68-5820.

Coram: A.B. Weselak, Gérard Legaré, Jean-Pierre Houle.

Port d'entrée. - Se soustraire à l'examen - Plainte en vertu de la Loi sur l'immigration et accusation selon le droit pénal - Duplication des chefs d'accusation - Mens rea - La Loi sur l'immigration n'est pas une loi pénale.- Loi sur l'immigration: Art. 16; 19(1)(e)(vii); 19(2); 25; 50(a) - Loi sur la Commission d'appel de l'immigration: Art. 14(b); 15.

Arrêt: Une plainte portée en vertu de la Loi sur l'immigration ne peut être assimilée à une accusation selon le droit pénal et la duplication des chefs d'accusation ne peut avoir lieu qu'en matière pénale.- La Loi sur l'immigration n'est pas une loi pénale et la mens rea n'est pas un élément essentiel lorsqu'il s'agit de protéger l'intérêt public et aussi lorsqu'il y a dans la Loi, un article de portée pénale pour la même offence.

Le jugement de la Commission fut rendu par:

A.B. Weselak:

Les ordonnances d'expulsion jointes disent:

- "1) you are not a Canadian citizen;
- 2) you are not a person having Canadian domicile; and that
- 3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, in that you came into Canada at a place other than a Port of Entry and eluded examination under this Act;
- 4) you are subject to deportation in accordance with subsection (2) of Section 19 of the Immigration Act."

Les appelants se sont réunis à Rangely dans l'Etat du Maine et ont établi, à l'aide de cartes, la route à suivre pour atteindre le Canada. Le 25 août 1968 ils ont quitté Rangely situé à environ

Counsel for the Appellants challenged the validity of the order on three grounds:

- (1) That the third ground in each of the deportation orders created one offence of "entry" and "eluding" whereas the Immigration Act in Section 19(1)(e)(vii) created two grounds for deportation and therefore the ground was bad for duplicity and therefore is objectionable.
- (2) That the doctrine of mens rea should apply when the Board considers the allegation that the appellants came into Canada "other than at a port of entry".
- (3) That the appellants did not in fact "elude examination under the Act."

The appellants were formally arrested on August 26 and formally advised by the arresting officer that they were being arrested under Section 16 of the Immigration Act which provides:

"16. Every constable and other peace officer in Canada, whether appointed under the laws of Canada or of any province or municipality thereof, and every immigration officer may, without the issue of a warrant, order or direction for arrest or detention, arrest and detain for an inquiry or for deportation or both any person who upon reasonable grounds is suspected of being a person referred to in subparagraph (vii), (viii), (ix) or (x) of paragraph (e) of subsection (1) of section 19."

Section 25 of the Immigration Act requires that when a person is arrested in accordance with Section 16 of the Immigration Act, a Special Inquiry Officer shall cause an Inquiry to be held forthwith concerning the person. An Inquiry was held in the case of each of the appellants and in each case the Special Inquiry Officer read to the appellant the provisions of Section 19(1)(e)(vii) of the Immigration Act which reads as follows:

"19.(1) Where he has knowledge thereof, the clerk or secretary of a municipality in Canada in which a person hereinafter described resides or may be, an immigration officer or a constable or other peace officer shall send a written report to the Director, with full particulars, concerning

cinquante miles de la douane canadienne, et se sont fait conduire de l'aéroport de Rangely à Big Falls dans le Maine. Le même jour ils quittaient Big Falls et ensuite voyagèrent pendant deux jours à travers la campagne par des routes gravelées et des routes forestières.

Le conseiller des appelants a contesté la validité de l'ordonnance pour les trois motifs suivants:

- 1) le troisième motif de chaque ordonnance d'expulsion est fondé sur l'"entrée" et sur "se dérober" tandis que l'article 19(1)(e)(vii) de la Loi sur l'immigration comprend deux motifs d'expulsion, en conséquence le motif était mauvais puisque duplicable et par suite sujet à être rejeté;
- 2) la doctrine de mens rea devrait être appliquée lorsque la Commission considère l'allégation suivante: les appelants sont entrés au Canada "other than at a port of entry.";
- 3) en fait les appelants ne "se sont pas soustraits à l'examen prescrit par la Loi".

Le 26 août les appelants ont été officiellement arrêtés; l'agent chargé de l'arrestation leur a signifié qu'ils étaient arrêtés conformément à l'article 16 de la Loi sur l'immigration qui stipule:

"16. Chaque constable et chaque autre agent de la paix au Canada, nommés en vertu des lois du Canada ou d'une province ou municipalité canadienne, ainsi que tout fonctionnaire à l'immigration, peuvent, sans l'émission d'un mandat, d'une ordonnance ou de directives pour l'arrestation ou la détention, arrêter et détenir aux fins d'enquête ou d'expulsion, ou en vue des deux à la fois, toute personne qui, pour des motifs raisonnables, est soupçonnée d'être une personne mentionnée au sous-alinéa (vii), (viii), (ix) ou (x) de l'alinéa e) du paragraphe (1) de l'article 19."

L'article 25 de la Loi sur l'immigration stipule que dans le cas d'une personne arrêtée en vertu de l'article 16 de la Loi sur l'immigration, un enquêteur spécial doit immédiatement faire tenir une enquête à l'égard de la personne intéressée. A l'égard de chaque appelant une enquête a été tenue et l'enquêteur spécial a lu à chaque appelant les dispositions de l'article 19(1)(e)(vii) de la Loi sur l'immigration. Cet article dit:

(e) any person, other than a Canadian citizen or a person with Canadian domicile, who

(vii) came into Canada at any place other than a port of entry or eluded examination or inquiry under this Act or escaped from lawful custody or detention under this Act."

As a result of the Inquiry a deportation order was issued in each case the third ground of each order reading:

"3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, in that you came into Canada at a place other than a Port of Entry and eluded examination under this Act."

Counsel for the appellant objected to the substitution of the word "and" in the order for the word "or" in the statute contending that two offences in the statute were described as one offence in the order, and therefore the order was bad for duplicity. Counsel cited Tremeeear, Sixth Edition, at Page 1483 and in particular the case of R. v. Archer, (1955) S.C.R. 33, as her authority.

The Board has considered the authorities cited by counsel and finds that these authorities deal with criminal charges upon the validity of which the Criminal Courts found their jurisdiction.

In R. v. Vaaro, (1933) S.C.R. 36 at 42, Lamont, J., stated:

"There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge. The King v. Jeu Jang How (1919) 59 Can. S.C.R. 175. In the latter case the Crown cannot compel the accused to go into the witness box and answer all questions put to him while, under the Immigration Act, the immigrant is detained "for examination and an investigation" into the facts alleged, and he must answer the questions put to him. (Section 33(2) and section 42(2).) The object of making provision for a Board of Inquiry is to have at hand a tribunal which can without delay inquire into the truth of the allegations made in the complaint. In many cases the immigrant himself must necessarily be the chief witness."

In R. v. Alamazoff 3 W.W.R. 281, an application for bail pending inquiry under "The Immigration Act", Mathers, C.J.K.B., stated at Page 282;

"19(1) Lorsqu'il en a connaissance, le greffier ou secrétaire d'une municipalité au Canada, dans laquelle une personne ci-après décrite réside ou peut se trouver, un fonctionnaire à l'immigration ou un constable ou autre agent de la paix doit envoyer au directeur un rapport écrit, avec des détails complets, concernant

(e) tout personne, autre qu'un citoyen canadien ou une personne ayant un domicile canadien, qui

(vii) est entrée au Canada à un endroit autre qu'un port d'entrée ou s'est soustraite à l'examen ou à l'enquête prévue par la présente loi ou s'est évadée d'une garde ou détention légitime visée par cette loi,"

Au terme de l'enquête, une ordonnance d'expulsion a été émise; pour chaque appelant le troisième motif de l'ordonnance de chaque ordonnance dit:

"3) you are a person described under subparagraph (vii) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act, in that you came into Canada at a place other than a Port of Entry and eluded examination under this Act."

Le conseiller des appelants s'est opposé à la substitution du mot "et" dans l'ordonnance au mot "ou" dans le statut, soutenant que le statut décrit deux chefs d'accusations alors que l'ordonnance n'en expose qu'un; ainsi l'ordonnance est invalide pour duplication de chefs d'accusation. Le conseiller des appelants se réfère à l'autorité de Tremeeer (Sixth Edition) et cite notamment à la page 1483 l'affaire R. c. Archer (1955) S.C.R. 33.

La Commission a considéré le poids de l'autorité citée par le conseiller et déclare que celle-ci étudie des charges pénales sur lesquelles statuent les cours criminelles.

Dans l'affaire R. c. Vaaro (1933) S.C.R. pp. 36 à 42, le juge Lamont a déclaré:

"There is no analogy between a complaint under the Immigration Act and an indictment on a criminal charge. The King v. Jeu Jang How (1919) 59 Can. S.C.R. 175. In the latter case the Crown cannot compel the accused to go into the witness box and answer all questions put to him while, under the

"The application is based both on the common law and on sec. 3 of The Habeas Corpus Act, 31 Car. II., ch. 2.

That Act only applies where the person seeking its aid

"shall be committed for any crime (unless for treason or felony) in vacation time and out of term." Counsel for the applicants argued that these deportation proceedings are criminal in their essence because there is first a charge then an order for arrest followed, if found guilty, by a sentence of deportation." I have found no English or Canadian authority on the point, but a consideration of the purpose of the Immigration Act convinces me that proceedings for the deportation of an undesirable alien are in no sense criminal proceedings and that a person arrested and detained for such purpose is not "committed for any crime" within the meaning of The Habeas Corpus Act. The object and purpose of the proceedings is not to punish for an offence against the law of Canada. It is to ascertain whether or not the conditions upon which the alien was permitted to enter and reside in Canada have been complied with by him or whether they have been broken."

The Board can find no analogy between an information and a deportation order, the jurisdiction of the Special Inquiry Officer to hold an Inquiry is not dependant upon the deportation order, the order is the result of the Inquiry. The proceedings in this case were commenced by an arrest under Section 16 of the Immigration Act, after which they were detained for an inquiry as they were on reasonable grounds suspected of being persons referred to in subparagraph (vii), (viii), (ix) or (x) of paragraph (e) of subsection 1 of Section 19.

Section 25 of the Immigration Act reads as follows:

"25. Where a person is, pursuant to section 15 or 16, arrested with or without a warrant, a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person."

The jurisdiction of the Special Inquiry Officer to hold an Inquiry under Section 16 is not dependant upon any written or formal report or information; it follows upon an arrest and detention under Section 16 as Section 25 directs "a Special Inquiry Officer shall forthwith cause an inquiry to be held concerning such person".

Immigration Act, the immigrant is detained "for examination and an investigation" into the facts alleged, and he must answer the questions put to him. (Section 33(2) and section 42(2).) The object of making provision for a Board of Inquiry is to have at hand a tribunal which can without delay inquire into the truth of the allegations made in the complaint. In many cases the immigrant himself must necessarily be the chief witness."

Dans l'affaire R. c. Alamazoff 3 W.W.R. 281, les faits sont les suivants: une demande de cautionnement lors d'une enquête tenue aux termes de la Loi sur l'immigration. A ce sujet Mathers, C.J.K.B., à la page 282 a déclaré:

"The application is based both on the common law and on sec. 3 of The Habeas Corpus Act, 31 Car. II., ch. 2.

That Act only applies where the person seeking its aid

"shall be committed for any crime (unless for treason or felony) in vacation time and out of term." Counsel for the applicants argued that these deportation proceedings are criminal in their essence because there is first a charge then an order for arrest followed, if found guilty, by a sentence of deportation. I have found no English or Canadian authority on the point, but a consideration of the purpose of the Immigration Act convinces me that proceedings for the deportation of an undesirable alien are in no sense criminal proceedings and that a person arrested and detained for such purpose is not "committed for any crime" within the meaning of The Habeas Corpus Act. The object and purpose of the proceedings is not to punish for an offence against the law of Canada. It is to ascertain whether or not the conditions upon which the alien was permitted to enter and reside in Canada have been complied with by him or whether they have been broken."

La Commission ne trouve aucun rapport d'analogie entre un renseignement et une ordonnance d'expulsion, la compétence de l'enquêteur spécial (i.e. tenir une enquête) ne dépend de l'ordonnance d'expulsion, puisque l'ordonnance résulte de l'enquête. Dans cette affaire la procédure a commencé par l'arrestation des appelants selon l'article 16 de la Loi sur l'immigration, puisqu'on avait des motifs raisonnables de soupçonner qu'ils appartenaient à la catégorie de

The pertinent section of the Act was read to the appellants at the Inquiries and as a result the Board finds that the proper procedure was followed and that the rights of the appellants were not prejudiced in any way and that the Inquiries were proper Inquiries.

The second ground for appeal raised by Counsel for the appellants was the contention that mens rea was an essential element in the allegation that each of the appellants came into Canada at any place other than a port of entry. The evidence clearly reveals that they did as a fact come into Canada at other than a port of entry, the question remains "is mens rea an essential element".

The Courts have held that in the cases cited (supra) that the Immigration Act is not a penal statute. Therefore we must look at the Act and its purpose to determine whether mens rea is an essential element. The rule is stated in Trenmear's Annotated Criminal Code, Sixth Edition at Page 20

"While an offence of which mens rea is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention."

and further down on Page 20

"The effect of the English decisions was summarized by Wright, J., in Sherras v. DeRutzen, (1895) 1 Q.B. 918, 18 Cox C.C. 157: "Apart from isolated and extreme cases ***the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which *** are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. *** Another class comprehends some, and perhaps all, public nuisances. *** Lastly, there may be cases in which, although the proceeding is criminal in form it is really only a summary mode of enforcing a civil right"."

also on Page 21

"The statute (the Weights and Measures Act, R.S.C. 1927, c. 212, s. 63) is for the protection of the public and with respect to such enactments, as well as those relating to the revenue, the sale of intoxicating liquors, and most, if not all of those containing prohibitions not falling within the proper domain of criminal law, the general rule is, contrary to the common law, that mens rea is not a necessary ingredient of the offence."

personnes décrites au sous alinéa (vii), (viii), (ix) ou (x) de l'alinéa (e) du paragraphe 1 de l'article 19; ensuite ils ont été détenus aux fins d'une enquête.

L'article 25 de la Loi sur l'immigration dit:

"25. Lorsqu'une personne est arrêtée avec ou sans mandat, selon l'article 15 ou 16, un enquêteur spécial doit immédiatement faire tenir une enquête à l'égard de cette personne."

En vertu de l'article 16 la compétence de l'enquêteur spécial relative à la tenue d'une enquête est indépendante soit de l'émission d'un rapport écrit ou officiel soit de la communication d'un renseignement; l'enquête fait suite à une arrestation et détention en vertu de l'article 16 ainsi que l'article 25 le stipule: "un enquêteur spécial doit immédiatement faire tenir une enquête à l'égard de cette personne."

Aux enquêtes, on a lu l'article pertinent aux appelants; ainsi la Commission déclare que la procédure suivie fut régulière, de plus qu'en aucune façon les appelants n'ont été lésés dans leur droit et qu'en conséquence les enquêtes tenues ont été régulières.

En second moyen d'appel, le conseiller des appelants a soutenu que l'allégation à l'effet que les appelants sont entrés au Canada ailleurs qu'à un port d'entrée doit contenir un élément essentiel d'intention coupable. La preuve montre clairement qu'en fait ils sont entrés au Canada ailleurs qu'à un port d'entrée; donc la question à résoudre est la suivante: "is mens rea an essential element."

Dans les affaires citées (supra) les cours ont déclaré que la Loi sur l'immigration n'est pas une loi pénale. En conséquence nous devons examiner la Loi et ses objectifs afin de déterminer si mens rea est un élément essentiel. Tremmear's Annotated Criminal Code, Sixth Edition, à la page 20 propose la règle suivante:

"While an offence of which mens rea is not an essential ingredient may be created by legislation, in view of the general rule a section creating an offence ought not to be so construed unless Parliament has, by express language or necessary implication, disclosed such an intention."

il poursuit:

"The effect of the English decisions was summarized by Wright, J., in Sherras v. DeRutzen, (1895) 1 Q.B.

Section 50 of the Immigration Act provides:

"50. Every person who

- (a) Comes into Canada at any place other than a port of entry and fails to report to an immigration officer for examination is guilty of an offence and is liable on summary conviction, for the first offence to a fine not exceeding five hundred dollars and not less than fifty dollars or to imprisonment for a term not exceeding six months and not less than one month or to both fine and imprisonment, and, for the second offence to a fine not exceeding one thousand dollars and not less than one hundred dollars or to imprisonment for a term not exceeding twelve months and not less than three months or to both fine and imprisonment, and, for the third or a subsequent offence to imprisonment for a term not exceeding eighteen months and not less than six months."

The appellants were charged under Section 50(a), were found guilty and fined \$50.00 each or one day in jail.

One of the purposes of the Immigration Act is to protect the public and the public interest, to prevent indiscriminate entry into this country of among other persons, of undesirables or people of questionable moral character. It has been held repeatedly that where the public interest is involved, and particularly where the offence is also in the statute punishable by a fine or imprisonment that if the offence has been committed in fact that mens rea is not an essential element.

The Board finds that this is so in the case of each of the appellants and finds that the absence of mens rea does not invalidate the ground in the order relating to the coming into Canada at any place other than a port of entry. The Board therefore does not find it necessary to determine whether the appellants had this intent or not.

The Board finds this ground of the orders valid and having found this ground to be valid it finds it unnecessary to determine whether they eluded examination under the Act.

The Board therefore finds that the orders are valid and legal and made in accordance with the Immigration Act and Regulations thereunder and dismisses the appeals under Section 14 of the Immigration Appeal Board Act.

918, 18 Cox C.C. 157: "Apart from isolated and extreme cases ***the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which *** are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. *** Another class comprehends some, and perhaps all, public nuisances. *** Lastly, there may be cases in which, although the proceeding is criminal in form it is really only a summary mode of enforcing a civil right".

et à la page 21:

"The statute (the Weights and Measures Act, R.S.C. 1927, c. 212, s. 63) is for the protection of the public and with respect to such enactments, as well as those relating to the revenue, the sale of intoxicating liquors, and most, if not all of those containing prohibitions not falling within the proper domain of criminal law, the general rule is, contrary to the common law, that mens rea is not a necessary ingredient of the offence."

L'article 50 de la Loi sur l'immigration stipule:

"50. Est coupable d'une infraction et encourt, sur déclaration sommaire de culpabilité, pour la première infraction, une amende d'au plus cinq cents dollars et d'au moins cinquante dollars ou un emprisonnement d'au plus six mois et d'au moins un mois ou à la fois l'amende et l'emprisonnement et, pour la deuxième infraction, une amende d'au plus mille dollars et d'au moins cent dollars ou un emprisonnement d'au plus douze mois et d'au moins trois mois ou à la fois l'amende et l'emprisonnement et, pour la troisième infraction ou une infraction subséquente, un emprisonnement d'au plus dix-huit mois et d'au moins six mois, quiconque

- a) entre au Canada à tout endroit autre qu'un port d'entrée et ne se présente pas devant un fonctionnaire à l'immigration pour examen;
- b) entre au Canada ou y demeure par la force ou par la ruse ou au moyen d'un passeport, visa, certificat médical ou autre document relatif à son admission, qui est faux ou a été irrégulièrement émis ou par d'autres renseignements faux ou trompeurs ou par des moyens frauduleux, qu'il sait être faux, trompeurs ou irréguliers;"

With regard to the discretionary powers under Section 15 of the Immigration Appeal Board Act, the Board has carefully considered the evidence before it, together with the submissions of counsel, and it cannot find such compassionate or humanitarian considerations which in its opinion would warrant the granting of such special relief as provided for in the Immigration Appeal Board Act. It therefore directs that the deportation orders be executed as soon as practicable.

Concurred in by: Gérard Legaré and Jean-Pierre Houle.

For the appellants: J. Veit, Barrister & Solicitor;
for the respondent: P. Betournay, Barrister and Solicitor.

Chaque appelant, inculpé aux termes de l'article 50(a), a été déclaré coupable et passible d'une amende de cinquante dollars ou d'un emprisonnement d'un jour.

Un des objectifs de la Loi sur l'immigration est la protection du public et des intérêts publics; elle empêche les personnes indésirables ou de moralité douteuses d'entrer sans contrôle au Canada. On a répété maintes fois que lorsqu'il s'agit de l'intérêt public et notamment quand la Loi prévoit pour la violation une amende ou une peine d'emprisonnement et que si de fait la violation a été commise la mens rea n'est pas un facteur essentiel.

La Commission déclare qu'il en est ainsi pour chaque appelant et déclare que l'absence d'intention coupable n'invalide pas le motif de l'ordonnance d'expulsion relatif à l'entrée au Canada ailleurs qu'à un port d'entrée. En conséquence la Commission ne juge pas nécessaire de déterminer si les appelants étaient animés de cette intention.

La Commission déclare que les ordonnances sont valides, par conséquent elle ne juge pas nécessaire de déterminer si les appelants se sont dérobés à l'examen que prescrit la Loi.

La Commission déclare que les ordonnances sont valides et légales et rendues en conformité de la Loi sur l'immigration et de son Règlement, par suite en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration elle rejette les appels.

Quant aux pouvoirs discrétionnaires accordés à la Commission par l'article 15 de la Loi sur la Commission d'appel de l'immigration, celle-ci, après un examen attentif de la preuve administrée devant elle et des plaidoiries du conseiller, déclare qu'elle ne peut trouver des motifs de pitié ou de considérations d'ordre humanitaire qui justifieraient l'octroi d'un redressement spécial.

En conséquence elle ordonne que l'ordonnance d'expulsion soit exécutée aussitôt que possible.

Ont souscrit: Gérard Legaré et Jean-Pierre Houle.

Pour les appelants: Me J. Veit;
pour l'intimé: M^c P. Betournay.

11.

Rajendra PRASAD,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 14, 1968;

File: 68-5396.

Coram: A.B. Weselak, Jean-Pierre Houle, Gérard Legaré.

Prohibited class: taking employment without the written permission of an Immigration Officer. - S. 23 Report - Calling of witnesses by Special Inquiry Officer - Issuance of an unemployment insurance book and of a social security card cannot be construed as a written approval to take employment - Order of deportation valid if one ground is valid. - Retroactivity - Immigration Act: 5(t), 11(2)(3), 20, 21, 23, 28(3) - Immigration Regulations: 28, 29, 34(3)(d)(e)(f).-

Held: For an applicant in Canada to take employment without the written approval of an officer of the Department cause the applicant to fall within a prohibited class pursuant to Section 5(t) of the Immigration Act and S. 5 is imperative, mandatory, and upon rendering his decision, the Special Inquiry Officer shall make an order of deportation against the applicant. On that ground alone such an order of deportation would be valid and in conformity with law and the appeal should be dismissed. - An order of deportation can only be attacked on the basis of the grounds which support it. The power of inquiry and the power to call and examine witnesses or any person are vested in the Special Inquiry Officer and such powers are discretionary. - An applicant is not entitled to a medical examination as of right. - Relying on the Leal case, S. 34(3)(e) of the Immigration Regulations applies retroactively. - The issuance of an unemployment insurance book and of a social security card are not tantamount to a written permission to take employment.

The judgment of the Board was delivered by:

Jean-Pierre Houle:

The order of deportation reads:

- " (i) you are not a Canadian citizen,
 (ii) you are not a person having Canadian domicile,
 (iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations, Part I by reason of the fact that:

11.

Rajendra PRASAD,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 14 novembre 1968;

Dossier: 68-5396.

Coram: A.B. Weselak, Jean-Pierre Houle, Gérard Legaré.

Catégorie interdite: accepter un emploi sans la permission écrite d'un fonctionnaire à l'immigration - Rapport selon l'article 23 - sommation et interrogatoire de témoins par l'enquêteur spécial. L'émission d'un livret d'assurance-chômage ou d'une carte de sécurité sociale n'équivaut pas à une permission écrite d'accepter un emploi. - Une ordonnance d'expulsion est valide en droit si l'un des motifs est valide - Retroactivité - Loi de l'immigration: 5(t), 11(2)(3), 20, 21, 23, 28(3) - Règlement de l'immigration: 28, 29, 34(3)(d)(e)(f).-

Arrêt: Un requérant, au Canada, qui prend ou accepte un emploi sans avoir obtenu la permission écrite d'un fonctionnaire du Ministère, tombe dans une catégorie interdite en vertu de l'article 5(t) de la Loi sur l'immigration et cet article est impératif, obligatoire; et au moment de rendre sa décision, l'enquêteur doit émettre une ordonnance d'expulsion contre le requérant. Pour ce seul motif, l'ordonnance d'expulsion serait valide en droit et l'appel devrait être rejeté. Seuls les motifs contenus dans l'ordonnance d'expulsion peuvent être attaqués. C'est l'enquêteur spécial qui est investi du pouvoir d'enquêter et d'interroger des témoins ou toute autre personne et ce pouvoir est discrétionnaire. Un requérant ne peut exiger, de droit, un examen médical. S'appuyant sur le jugement dans l'affaire Leal, l'article 34(3)(e) s'applique retroactivement. - L'émission d'un livret d'assurance-chômage ou d'une carte de sécurité sociale ne peut être tenu pour équivaloir à une permission écrite de prendre ou d'accepter un emploi.

Le jugement de la Commission fut rendu par:

Jean-Pierre Houle:

L'ordonnance d'expulsion dit:

- " (i) you are not a Canadian citizen,
 (ii) you are not a person having Canadian domicile,
 (iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you do not fulfil or comply with the conditions and requirements of the Immigration Regulations, Part I by reason of the fact that:

- (a) you have taken employment in Canada without the written approval of an officer of the Department in contravention of paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part I,
- (b) you are not in possession of a valid and subsisting Immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part I,
- (c) your passport does not bear a medical certificate duly signed by a medical officer and you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I."

The appellant is a citizen of Fiji and has a valid British passport. He is married and his wife and two daughters reside at Ellington, Raki Raki, Fiji. The appellant entered Canada at Vancouver, B.C., January 21, 1967 as a visitor or tourist under Section 7(1)(c) of the Immigration Act until April 30, 1967 and his status was extended from April 21, 1967 to December 12, 1967. Prior to arrival in Canada, the appellant has had eight years of schooling and has worked as a stone mason, farmer and bus driver. The foregoing facts are not in dispute.

Counsel for the appellant has raised five issues in this particular case:

- 1.- can the examining Immigration Officer ask a person to leave Canada on the grounds of Section 34(3)(d),(e) and (f) and then make a Section 23 report on the grounds of Section 34(3)(e) and 28(1) and 29(1) so that the effect of such order is to exclude a Special Inquiry Officer from examining this case into the appellant's skill and qualifications;
- 2.- was the Special Inquiry Officer right in refusing to call the Immigration Officer who examined the appellant and was he right in refusing to call this officer as a witness;
- 3.- was the appellant entitled to a medical examination pursuant to Section 20 and 21 of the Immigration Act in connection with his examination by an Immigration Officer;
- 4.- if a person was employed prior to October 1st, 1967, is he caught within the prohibition of Section 34(e) although he is a person seeking admission under Section 7(3) of the Immigration Act because of his change in status by taking employment and in this particular case, in April of 1967;

- (a) you have taken employment in Canada without the written approval of an officer of the Department in contravention of paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part I,
- (b) you are not in possession of a valid and subsisting Immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part I,
- (c) your passport does not bear a medical certificate duly signed by a medical officer and you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part I."

L'appelant, citoyen des îles Fiji, possède un passeport britannique valide. Il est marié et sa femme et ses deux filles demeurent à Ellington, Raki Raki, Fiji. Le 21 juillet 1967 l'appelant est entré au Canada à Vancouver, à titre de visiteur ou touriste aux termes de l'article 7(1)(c) de la Loi sur l'immigration; son permis de séjour était valide jusqu'au 30 avril 1967 et le 21 avril 1967 il a obtenu la prorogation de son statut jusqu'au 12 décembre 1967. Avant son arrivée au Canada, l'appelant, après huit années de scolarité, a travaillé en tant que maçon, fermier et conducteur d'autobus. Les faits précédents ne sont pas contestés.

Dans cette affaire le conseiller de l'appel a exposé cinq litiges:

1. le fonctionnaire chargé de l'examen peut-il demander à une personne de quitter le Canada aux termes de l'article 34(3)(d)(e) et (f) et ensuite émettre un rapport prévu à l'article 23 fondé sur les articles 34(3)(e), 28(1) et 29(1); rapport qui a pour effet dans cette affaire d'empêcher l'enquêteur spécial de considérer les qualifications et la compétence professionnelle de l'appelant?
2. l'enquêteur spécial a-t-il eu raison de refuser de convoquer le fonctionnaire à l'immigration qui a examiné l'appelant, et a-t-il eu raison de refuser de convoquer ce fonctionnaire à titre de témoin?
3. l'appelant devait-il subir un examen médical prévu aux articles 20 et 21 de la Loi sur l'immigration alors qu'il était examiné par le fonctionnaire à l'immigration?

5.- did the appellant receive the written approval of an officer of the Department to take work under Section 34(3)(e) if he was issued an unemployment insurance book and a social security card or in other words, was the issuance of such a card and book tantamount to giving the written approval required by Section 34(3)(e).

The main ground for the Order of Deportation is laid down in reason iii(a) of said Order: "You have taken employment in Canada without the written approval of an officer of the Department in Contravention of paragraph (e) of subsection (e) of section 34 of the Immigration Regulations, Part I". And, for an applicant in Canada to take employment without the written approval of an officer of the Department cause the applicant to fall within a prohibited class pursuant to Section 5(t) of the Immigration Act which reads: "5. No person shall be admitted to Canada if he is a member of any of the following classes of persons ... (t): "persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders lawfully made or given under this Act or the regulations". It should be stressed that Section 5 of the Immigration Act is imperative, mandatory; "No person shall be admitted" and sub-section (t) refers to "persons who cannot or do not fulfil or comply with any of the conditions or requirements...". Thus an applicant in Canada who does not comply with the condition or requirement as set out in paragraph (e) of subsection (3) of Section 34 of the Immigration Regulations, Part I, shall not be admitted to Canada and the Special Inquiry Officer, pursuant to Section 28(3) of the Immigration Act, "Shall, upon rendering his decision, make an order for the deportation of such person.". On that ground alone such an order for deportation would be valid and in conformity with Law and should be dismissed and therefore there is no need to examine the other grounds based on the lack of a valid and subsisting Immigrant visa as required by subsection (1) of Section 28 of the Immigration Regulations, Part I, and of a medical certificate duly signed by a medical officer or of a medical certificate in the form prescribed by the Minister as required by subsection (1) of Section 29 of the Immigration Regulations, Part I (Ref: De Marigny v. Langlais (1948) S.C.R. 155 and Espaillet-Rodrigues (1964) S.C.R. 3). In this instance grounds (i) and (ii) for the Order of Deportation are not in dispute. Therefore the Order of Deportation made against the appellant is valid and in conformity with Law. It should be stressed that this instant appeal is against that Order of Deportation as made by Special Inquiry Officer, A.K. Beattie, on May 18, 1968, and cannot be against anything else. In other words, the main issues before the Board are the grounds on which the Deportation Order was made and the Order can only be attacked on the basis of the grounds which support it. Thus any attempt to raise an issue out of the so-called check-out letter, filed as Exhibit X'1, is completely irrelevant and has no bearing on the Deportation Order.

4. bien qu'elle ait cherché l'admission aux termes de l'article 7(3) de la Loi sur l'immigration une personne qui a occupé un emploi avant le 1^{er} octobre 1967 appartenait-elle à la catégorie interdite décrite à l'article 34(3) à cause de son changement de statut amené par le fait qu'elle a occupé un emploi en avril 1967?
5. quant à son emploi, peut-on dire que l'appelant a reçu l'approbation écrite d'un fonctionnaire du ministère prescrite à l'article 34(3)(e) puisque l'appelant s'est vu délivré une carte de sécurité sociale et un livret de chômage, en d'autres termes, la délivrance de la carte et du livret équivaut-elle à l'approbation écrite prévu à l'article 34(3)(e)?

Le motif iii (a) de l'ordonnance d'expulsion constitue le motif essentiel de l'ordonnance: "You have taken employment in Canada without the written approval of an officer of the Department in contravention of paragraph (3) of subsection (e) of section 34 of the Immigration Regulations, Part I." Et quand un requérant qui réside au Canada travaille sans l'approbation écrite d'un fonctionnaire du ministère, le demandeur alors appartient à la catégorie interdite décrite à l'article 5(t) de la Loi sur l'immigration qui dit: "5. Nulle personne ... ne doit être admise au Canada si elle est un membre de l'une des catégories suivantes: (t): les personnes qui ne peuvent remplir ni observer, ou qui ne remplissent ni n'observent, quelque condition ou prescription de la présente loi ou des règlements ou des ordonnances légitimement établies aux termes de la présente loi ou de ses règlements." Notons que l'article 5 est impératif et mandatoire; "Nulle personne ne doit être admise..." et le sous alinéa (t) vise "les personnes qui ne peuvent remplir ni observer quelque conditions ou prescriptions ..." Ainsi un requérant qui réside au Canada qui n'observe pas une condition ou une prescription décrite au sous-alinéa (e) de l'alinéa (3) de l'article 34 du Règlement sur l'immigration ne doit pas être admis au Canada et conformément à l'article 28(3) de la Loi sur l'immigration l'enquêteur spécial "doit, en rendant sa décision, émettre contre elle une ordonnance d'expulsion." Pour ce motif, l'ordonnance d'expulsion serait valide et en conformité de la Loi donc l'appel devrait être rejeté et en conséquence la Commission ne juge pas nécessaire d'examiner les autres motifs fondés sur: le défaut de visa d'immigrant valide et non périmé, visa prescrit par l'article 28(1) du Règlement sur l'immigration Partie I, et le défaut de certificat médical en la forme prescrite dûment signé par un médecin du ministère, certificat prévu par l'article 29(1) du Règlement sur l'immigration, Partie I (Ref: De Marigny c. Langlais (1948) S.C.R. 155 et Espaillat-Rodrigues (1964) R.C.S. 3). Dans cette affaire les motifs

To finally dispose of the first issue raised by Counsel for the Appellant, it is important to quote from the remarks made by the Chairman of the panel in this Appeal, as they appear at page 10 of the transcript:

"Chairman: With all due respect Mr. Drysdale, while this letter does contain three grounds at issue, I do not think it is necessary under the circumstances to include them in the Section 23 Report. Actually one ground for Deportation is sufficient and I really think you should restrict your arguments to the grounds in the Deportation Order."

and again at page 11:

"Chairman: There is nothing to stop you from bringing the background under Section 15. However, in legal argument we should restrict ourselves to the grounds in the Deportation Order."

Second issue raised by Counsel for the appellant is: Was the Special Inquiry Officer right in refusing to call the Immigration Officer who examined the appellant and was he right in refusing to call this officer as a witness?

The power of inquiry and the powers to examine witnesses or any person vested in the Special Inquiry Officer come under Section 11(2) & (3) of the Immigration Act.

Subsection 3 recites: "A Special Inquiry Officer has all the power and authority of a Commissioner appointed under Part I of the Inquiries Act and, without restricting the generality of the foregoing, may, for the purposes of an inquiry, (a) issue a summons to any person requiring him to appear --- to testify to all matters within his knowledge relative to the subject matter of the inquiry".

A Special Inquiry Officer may issue a summons to any person to testify to all matters within his knowledge relative to the subject matter of the inquiry..... (The underlines are mine). It is clear that the status here is permissive, leaving to the best judgment of the Special Inquiry Officer whether or not he should call or summons a person to testify; it is a power vested in the Special Inquiry Officer and it is he who ought to decide whether or not such power should be exercised. There is no doubt that in some circumstances it could be very helpful to call the immigration officer who had conducted the inquiry to testify on matters relative to the subject matter of the inquiry, but again the decision is left with the Special Inquiry Officer. Thus one may ask whether a

(i) et (ii) de l'ordonnance d'expulsion ne sont pas contestés. En conséquence l'ordonnance d'expulsion rendue contre l'appelant est valide et en conformité de la Loi. On doit remarquer que dans cette cause il y a appel de l'ordonnance d'expulsion telle que rendue par l'enquêteur spécial A.K. Beattie, le 18 mai 1968 et cet appel ne peut pas être à l'encontre d'autre chose. En d'autres termes, les principaux litiges amenés devant la Commission sont ceux qui ont fondé l'ordonnance d'expulsion, ainsi l'ordonnance ne peut être contestée que sur les motifs qui la fondent. Alors, toute démarche afin de soulever un litige à partir de la lettre (check out) déposée comme pièce à l'appui X'I est en dehors de la question et n'a aucun poids sur l'ordonnance d'expulsion.

Afin de trancher le premier litige déposé par le conseiller de l'appelant, il est important de citer les remarques (page 10 de la transcription) avancées par le président de la Cour formée pour cet appel:

"Chairman: With all due respect Mr. Drysdale, while this letter does contain three grounds at issue, I do not think it is necessary under the circumstances to include them in the Section 23 Report. Actually one ground for Deportation is sufficient and I really think you should restrict your arguments to the grounds in the Deportation Order."

et page 11:

"Chairman: There is nothing to stop you from bringing the background under Section 15. However, in legal argument we should restrict ourselves to the grounds in the Deportation Order."

Voici le deuxième litige soulevé par le conseiller de l'appelant: l'enquêteur spécial a-t-il eu raison de refuser de convoquer le fonctionnaire à l'immigration qui a examiné l'appelant, et a-t-il eu raison de refuser de convoquer ce fonctionnaire comme témoin?

En vertu de l'article 11(2) et (3) de la Loi sur l'immigration l'enquêteur spécial a le pouvoir d'enquête et les pouvoirs d'examiner les témoins ou toutes autres personnes citées par l'enquêteur spécial.

Le sous alinéa 3 dit: "Un enquêteur spécial possède tous les pouvoirs et toute l'autorité d'un commissaire nommé en vertu de la Partie I de la Loi sur les enquêtes et, sans restreindre la généralité de ce qui précède peut, aux fins d'une enquête, (a) émettre une sommation à toute personne lui enjoignant de comparaître ... de rendre témoignage sur toutes questions à sa connaissance concernant le sujet de l'enquête...".

Special Inquiry Officer, in a given instance, has been unwise in not calling an immigration officer to testify, but certainly this is not a question on which the Board has to pass judgment. The case would be different if the "inaction" of the Special Inquiry Officer would result into gross injustice or into a denial of natural justice to an appellant and the Law provides remedies to cure such a situation. As for the third issue raised by Counsel for the appellant, one may say that Counsel has disposed of it in his own way. To quote at page 14 of the transcript of evidence:

"Mr. Drysdale: The other point which I raised, the third point, and might raise just in passing. It is not that important, whether Mr. Prasad was entitled to a medical examination under Sections 20 and 21 of the Immigration Act. There appears to be some authority that a person seeking admission to Canada shall undergo a physical or medical examination by a medical officer. This of course could be ordered at any time but again I had made the request at the inquiry in order to put the full situation before the Immigration Appeal Board. The difficulty I am faced with is that I just want to make one trip to Ottawa if I can avoid it. When an inquiry is instituted by a Special Inquiry Officer, if it covers the widest possible grounds, surely there cannot be any unfairness as far as the Board is concerned. All that I was seeking to do was to have the assessment put in by the examining immigration officer as to skills and qualifications, to have either the S.I.O. or immigration officer give him a medical examination. This would not prevent the Immigration Department from using Section 29(1) because Mr. Prasad would still not be in possession of a medical certificate but the matter which I felt that was of some concern to the Board was to ascertain if he was physically fit...."

In any case medical requirements are dealt with under Section 29(1)(2) of the Immigration Regulations, Part I. The appellant does not meet the requirements under Section 29(1) and on this ground alone, the Deportation Order would be valid. As the question asked by Counsel was: "Was the appellant entitled to a medical examination ..." it is of interest to recite subsection (2) of Section 29: "(2) Where at an examination of an immigrant under the Act the immigration officer has any doubt as to the physical or mental condition of such person, he may refer the immigrant for further medical examination by a medical officer". (Underlines are mine)

L'enquêteur spécial peut émettre une sommation à toute personne ... afin qu'elle rende témoignage sur toutes questions à sa connaissance concernant le sujet de l'enquête (nous soulignons). Il est évident qu'ici la loi n'est pas impérative elle laisse à la juste appréciation de l'enquêteur spécial la convocation ou la sommation d'une personne qui rendra témoignage; la loi accorde ce pouvoir à l'enquêteur spécial et lui seul détermine s'il doit exercer ce pouvoir. Sans aucun doute, dans quelques cas il serait très utile de convoquer le fonctionnaire à l'immigration qui a procédé à l'enquête afin de recueillir son témoignage, mais là encore la décision incombe à l'enquêteur spécial. Ainsi on peut se demander si l'enquêteur spécial, dans ce cas, a manqué de circonspection en ne convoquant pas le fonctionnaire à l'immigration? Toutefois il est évident que la Commission n'a pas à se prononcer sur cette question. Le cas serait tout autre si l'"inaction" de l'enquêteur spécial avait entraîné une grossière injustice ou un déni des principes de justice naturelle à l'égard de l'appelant et alors dans ce cas la loi procure les moyens de remédier à cet état de choses.

Quant au troisième litige présenté au nom de l'appelant, on pourrait dire que le conseiller l'a réglé. En effet il dit à la page 14 de la transcription de la preuve:

" Mr. Drysdale: The other point which I raised, the third point, and might raise just in passing. It is not that important, whether Mr. Prasad was entitled to a medical examination under Sections 20 and 21 of the Immigration Act. There appears to be some authority that a person seeking admission to Canada shall undergo a physical or medical examination by a medical officer. This of course could be ordered at any time but again I had made the request at the inquiry in order to put the full situation before the Immigration Appeal Board. The difficulty I am faced with is that I just want to make one trip to Ottawa if I can avoid it. When an inquiry is instituted by a Special Inquiry Officer, if it covers the widest possible grounds, surely there cannot be any unfairness as far as the Board is concerned. All that I was seeking to do was to have the assessment put in by the examining immigration officer as to skills and qualifications, to have either the S.I.O. or immigration officer give him a medical examination. This would not prevent the Immigration Department from using Section 29(1) because Mr. Prasad would still not be in possession of a medical certificate but the matter which I felt that was of some concern to the Board was to ascertain if he was physically fit...."

En tous les cas, l'article 29(1)(2) du Règlement sur l'immigration Partie I traite des conditions relatives à l'état physique ou mental du demandeur. La non conformité à l'une des conditions prévues à l'article 29(1) constitue un motif qui en lui même validerait une

The permissive phrase "he may" is the answer to the question as phrased by Counsel.

The question of applicability of Section 34(3)(e) of the Immigration Regulations, Part I, which constitutes the fourth issue raised by Counsel for the appellant, to a person who has taken employment prior to October 1st, has been resolved in the affirmative by the Board in the case involving Joao de Sousa Leal. It is of interest to note that application for leave to appeal in the Leal case, was refused by the Supreme Court of Canada.

As for the fifth issue raised by Counsel for the appellant, to say: "did the appellant receive the written approval of an officer of the Department to work under Section 34(3)(e) if he was issued an unemployment insurance book and a social security card or in other words, was the issuance of such a card and book tantamount to giving the written approval required by Section 34(3)(e)", the Board is prepared to make its own the argument submitted by Counsel for the respondent (at page 28 and 29 of transcript of evidence) and which essentially says 1) that social security cards and unemployment insurance books are not issued by the Department of Manpower and Immigration and 2) that no tribunal considering these matters would rationally conclude that the language, written approval of an officer of the Department, could be construed as including any officer whose duties did not involve considering these matters and, at the moment, only immigration officers are involved.

To sum up the case and to dispose of the legal arguments: the main reason for the Deportation Order against the appellant is that he has taken employment in contravention of Section 34(3)(e) of the Immigration Regulations, Part I and by doing so the appellant has placed himself within a prohibited class pursuant to Section 5(t) of the Immigration Act. The Board is satisfied that the appellant has taken employment without the written approval of an officer of the Department and on that ground alone the Board shall dismiss the appeal. Furthermore all other grounds as included in the Deportation Order dated May 16, 1968, are also valid. The Board therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

Finally the Board has considered the appellant's position in regard of Section 15 of the Immigration Appeal Board Act and cannot find sufficient grounds to exercise its discretion under this section.

The Board therefore directs that the Deportation Order be executed as soon as practicable.

Concurred in by: A.B. Weselak and Gérard Legaré.

For the appellant: John A.W. Drysdale, Barrister & Solicitor
for the respondent: R.E. Williams, Barrister and Solicitor.

ordonnance d'expulsion. La question posée par le conseiller était: "Was the appellant entitled to medical examination ..."; à ce sujet il convient de citer le sous alinéa (2) de l'article 29: "(2) Lorsque, pendant l'examen d'un immigrant sous le régime de la Loi, le fonctionnaire à l'immigration a quelque doute sur l'état physique de ladite personne, il peut renvoyer l'immigrant à un médecin du ministère pour lui faire subir un autre examen."

(Nous soulignons). L'expression "il peut renvoyer" constitue la réponse à la question formulée par le conseiller.

Le quatrième litige soulevé par le conseiller de l'appelant est le suivant: l'article 34(3)(e) du Règlement sur l'immigration vise-t-il une personne qui a occupé un emploi avant le 1^{er} octobre? La Commission a tranché ce litige en répondant affirmativement dans l'affaire impliquant Joao de Sousa Leal. Il est intéressant de noter que la Cour Suprême a refusé que l'affaire Leal soit portée devant elle.

Quant au cinquième litige avancé par le conseiller de l'appelant, à savoir: "did the appellant receive the written approval of an officer of the Department to work under Section 34(3)(3) if he was issued an unemployment insurance book and a social security card or in other words, was the issuance of such a card and book tantamount to giving the written approval required by Section 34(3)(e)". La Commission est disposée à faire sien l'argument présenté par le conseiller de l'intimé; cet argument dit en substance (page 28 et 29 de la transcription de la preuve) 1) la carte de sécurité et le livre d'assurance chômage ne sont pas délivrés par le ministère de la Main-d'oeuvre et de l'immigration et 2) qu'à l'examen de ces questions aucun tribunal en toute logique ne conclurait que l'expression, approbation écrite d'un fonctionnaire du ministère, pourrait être interprétée de façon à comprendre tous les fonctionnaire dont la fonction ne regarde pas ces questions; par conséquent il ne s'agit que des fonctionnaires à l'immigration.

Résumons l'affaire pour statuer; le principal motif de l'ordonnance d'expulsion rendue contre l'appelant est le suivant: M. Prasad a occupé un emploi, contrevenant ainsi à l'article 34(3)(e) du Règlement sur l'immigration Partie I et en ce faisant l'appelant est tombé dans la catégorie interdite visée par l'article 5(t) de la Loi sur l'immigration. La Commission est convaincue que l'appelant a occupé un emploi sans l'approbation écrite d'un fonctionnaire du ministère et pour ce motif, en lui-même, elle doit rejeter l'appel. En outre, tous les autres motifs compris dans l'ordonnance d'expulsion datée du 16 mai 1968 sont valides. En conséquence, la Commission rejette l'appel en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration.

En dernier lieu, la Commission a étudié cette affaire sous l'article 15 de la Loi sur la Commission d'appel de l'immigration mais elle ne peut trouver de motifs suffisants pour exercer sa discrétion aux termes de cet article.

En conséquence, la Commission ordonne que l'ordonnance d'expulsion soit exécutée aussitôt que possible.

Ont souscrit: A.B. Weselak et Gérard Legaré

Pour l'appelant: Me John A.W. Drysdale;
pour l'intimé: Me R.E. Williams.

12.

Randall Jay CAUDILL,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 25, 1968;

File: 68-5522.

Coram: J.C.A. Campbell, Vice-Chairman; Jean-Pierre Houle, J.A. Byrne.

Jurisdiction of the Board as to the re-opening of a hearing. - Special circumstances warranting the re-opening - application for financial assistance not received by the Board - Respondent's written submissions served too late on the appellant - Appellant deprived in a practical sense of a fair hearing. - Assessment by Immigration Officer - not manifestly wrong or based upon a wrong principle - review of assessment by the Board. - One valid ground in a deportation order is sufficient to uphold such order. - Discretion of the Board under S. 15 of the Immigration Appeal Board Act: political activities and unusual hardship. Immigration Regulations: 28(2), 29(1), 34(3)(e)(f) - Immigration Appeal Board Act: 15. - Immigration Appeal Board Rules: 16.

Held: The Board has jurisdiction to re-open the hearing of an appeal and it will be for the applicant to show that in his case very special circumstances warrant such an order to re-open. (Ref. Tsantilli (Illiopoulos) appeal.). An application for financial assistance was made and should have been considered before the Appeal was heard. If the application had been refused counsel for the appellant might well have adopted some other method of presenting the appeal.- In the circumstances of this particular case the failure to forward the application for financial assistance in time for it to be considered and the result of such consideration notified to the appellant before the date set for the appeal hearing is such a special circumstance that it warrants the Board ordering the appeal hearing to be re-opened.- Respondent's written pleadings were not served on appellant within a reasonable time.

The question whether the Board has the authority or jurisdiction to make a reassessment of an appellant was decided in the appeal of Gioulekas v the Minister of Manpower and Immigration: the Board will review the assessment and substitute its own opinion for that of the Immigration Officer only when the evidence will show that the Immigration Officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. If the appellant did not provide full, true and complete information leading up to his assessment he cannot now come before the Board to complain that he was assessed unfairly.

12.

Randall Jay CAUDILL,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 25 novembre 1968;

Dossier: 68-5522.

Coram: J.C.A. Campbell, vice-président, Jean-Pierre Houle, J.A. Byrne

Compétence de la Commission pour ordonner une réouverture d'instance.- Circonstances particulière justifiant une réouverture d'instance. - Demande d'aide financière - non reçue par la Commission - Plaidoiries écrites de l'intimé fournies tardivement à l'appelant - L'appelant, à toutes fins pratiques, n'a pu se faire entendre. - Appréciation non erronée ou appuyée sur un principe faux - revision de l'appréciation par la Commission. - Un motif valide dans l'ordonnance d'expulsion suffit à rendre valide ladite ordonnance. - Pouvoirs discrétionnaires de la Commission en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration: activités d'un caractère politique ou graves tribulations. - Règlement de l'immigration: 28(2), 29(1), 34(3)(e)(f).- Loi sur la Commission d'appel de l'immigration: 15.- Règles de la Commission d'appel de l'immigration: 16.

Arrêt: La Commission a compétence pour ordonner une réouverture d'instance et il appartient au requérant de démontrer que dans son cas, il existe des circonstances particulières qui justifient une telle ordonnance.- (Ref. l'appel de Tsantilli (Illiopoulos)).- Une demande d'aide financière avait été présentée et il aurait dû en être décidé avant l'audition de l'appel. Si ladite demande avait été rejetée, le procureur de l'appelant aurait très bien pu varier ses moyens au soutien de l'appel. Dans cette affaire particulière le défaut de procéder en temps utile sur la demande d'assistance et d'en porter l'adjudication à la connaissance de l'appelant avant l'audition de son appel constitue une telle circonstance particulière qui justifie une ordonnance de réouverture d'instance. Ce à quoi on peut ajouter que les plaidoiries écrites de l'intimé n'ont pas été signifiées à l'appelant en temps utile.

La question de savoir si la Commission a la compétence voulue pour réapprécier un appelant, a été tranchée dans l'affaire de Gioulekas et le Ministre de la Main-d'œuvre et de l'immigration: la Commission ne revisera l'appréciation faite par un fonctionnaire à l'immigration et ne substituera sa propre opinion à la sienne que s'il y a preuve que ce fonctionnaire en est venu à une conclusion manifestement erronée ou s'est appuyé sur un principe faux. Si l'appelant n'a pas fourni tous les renseignements vrais et complets, il ne peut alors comparaître devant la Commission pour alléguer qu'il a été improprement apprécié.

One valid ground in a deportation order is sufficient to uphold such order even if other grounds set out in the order are invalid.

To be liable to punishment for being an absentee without leave from the United States Marine Corps is certainly not the result of political activities nor can it be construed as being "unusual hardship". The fact that the appellant's opinion regarding the involvement of his country in the war in Viet Nam differs from those in authority in his country do not in the opinion of the Board constitute the existence of such compassionate or humanitarian grounds as to warrant the granting of special relief and the exercise by the Board of its discretion.

The judgment of the Board was delivered by:

J.C.A. Campbell, Vice-Chairman:

The order of deportation reads:

- " (i) you are not a Canadian citizen
 (ii) you are not a person having Canadian domicile,
 (iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of:
- (a) paragraph (e) of subsection 3 of section 34 of the Immigration Regulations in that you have taken employment in Canada without the written approval of an officer of the Department,
 - (b) paragraph (f) of subsection 3 of section 34 of the Immigration Regulations in that, in my opinion you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A except with respect to arranged employment,
 - (c) you are not in possession of a letter of pre-examination as required by subsection (2) of section 28 of the Immigration Regulations Part I of the Immigration Act,
 - (d) you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations Part I of the Immigration Act."

L'existence dans une ordonnance d'expulsion d'un motif fondé en droit suffit à valider une telle ordonnance, même si les autres motifs ne sont pas fondés.

Un châtement éventuel pour avoir déserté le Marine Corps des Etats-Unis n'est certainement pas le résultat d'une activité de caractère politique et ne saurait être considéré comme de "graves tribulations". Le fait pour l'appelant de différer d'opinion avec les autorités de son pays sur la participation de celui-ci dans la guerre du Viet Nam ne saurait, de l'avis de la Commission, causer l'existence de motifs de compassion ou d'humanité suffisants pour apporter un redressement particulier et pour l'exercice, par la Commission, de ses pouvoirs discrétionnaires.

Le jugement de la Commission fut rendu par:

J.C.A. Campbell, vice-président:

L'ordonnance d'expulsion dit:

- " (i) you are not a Canadian citizen
 (ii) you are not a person having Canadian domicile,
 (iii) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of:
- (a) paragraph (e) of subsection 3 of section 34 of the Immigration Regulations in that you have taken employment in Canada without the written approval of an officer of the Department,
 - (b) paragraph (f) of subsection 3 of section 34 of the Immigration Regulations in that, in my opinion you would not have been admitted to Canada for permanent residence if you had been examined outside Canada as an independent applicant and assessed in accordance with the norms set out in Schedule A except with respect to arranged employment,
 - (c) you are not in possession of a letter of pre-examination as required by subsection (2) of section 28 of the Immigration Regulations Part I of the Immigration Act,
 - (d) you are not in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations Part I of the Immigration Act."

Consequent upon the issuing and serving of the deportation order upon Mr. Caudill on June 11, 1968 he filed a Notice of Appeal also dated June 11, 1968. In his Notice of Appeal he stated that he wished to be present or represented at the hearing of his appeal in order to make oral submissions to the Board, that he wished to call witnesses at the hearing of the appeal and that he wished to make submissions in writing.

Notice of hearing of this appeal dated July 5, 1968 was sent by the Board to the appellant and his counsel Mr. R.D. Gibson, Barrister-at-law. On July 26, 1968 a telegram from Mr. Gibson was received by the Board which read as follows:

"ON ADVICE WINNIPEG IMMIGRATION OFFICIALS REQUEST
POSTPONEMENT R.J. CAUDILL APPEAL DUE TO INABILITY
TO FORWARD FINANCIAL ASSISTANCE APPLICATION AND
WRITTEN SUBMISSION R.D. GIBSON APPELLANT'S COUNSEL"

As a result of Mr. Gibson's telegram an adjournment was granted until September 4, 1968 at 2:00 p.m. Appellant and his counsel were notified by telegram of the adjournment. A memorandum dated August 7, 1968 from Special Inquiry Officer L. Robertson was received by the Board on August 13, 1968, the relevant paragraphs read as follows:

"The appellant's counsel, Mr. Gibson, was contacted by telephone on July 29, 1968 and informed of the 6-week postponement.

Mr. Gibson stated that he is representing Mr. Caudill without fee on behalf of the Legal Aid Committee, as the subject has no funds. It is Mr. Gibson's intention to submit a written submission to the Appeal Board but Mr. Caudill would like to also appear in person before the Board and it is on his behalf that financial assistance will be requested."

On August 19, 1968 the Board received a letter from Mr. Gibson dated August 15, 1968 enclosing written submissions on behalf of the appellant. Paragraph two of his letter stated:

"It is not possible, for financial reasons, for me to appear before the Board on Mr. Caudill's behalf, but he wishes to appear himself, and has made an application for financial assistance in this regard. He will not be calling witnesses."

Le 11 juin 1968 M. Caudill, en réponse à l'émission et à la signification d'une ordonnance d'expulsion rendue contre lui, a déposé un avis d'appel. Dans cet avis d'appel il a déclaré vouloir (1) être présent ou représenté à l'audition de son appel afin de soumettre une plaidoirie orale à la Commission, (2) convoquer des témoins à l'audition de son appel et (3) déposer une plaidoirie écrite.

Le 5 juillet 1968 la Commission a envoyé un avis d'appel à M. R.D. Gibson, avocat. Le 26 juillet 1968 la Commission recevait un télégramme de M. Gibson qui disait:

"ON ADVICE WINNIPEG IMMIGRATION OFFICIALS REQUEST
POSTPONEMENT R.J. CAUDILL APPEAL DUE TO INABILITY
TO FORWARD FINANCIAL ASSISTANCE APPLICATION AND
WRITTEN SUBMISSION R.D. GIBSON APPELLANT'S COUNSEL"

Suite au télégramme de M. Gibson la Commission ajournait l'audition de l'appel et la remettait au 4 septembre à 14:00 h. Un télégramme a avisé l'appelant et son conseiller de l'ajournement. Le 13 août 1968 la Commission a reçu un mémoire daté du 7 août 1968 émis par M. L. Robertson, enquêteur spécial. Dans ce mémoire les paragraphes pertinents disent:

"The appellant's counsel, Mr. Gibson, was contacted by telephone on July 29, 1968 and informed of the 6-week postponement.

Mr. Gibson stated that he is representing Mr. Caudill without fee on behalf of the Legal Aid Committee, as the subject has no funds. It is Mr. Gibson's intention to submit a written submission to the Appeal Board but Mr. Caudill would like to also appear in person before the Board and it is on his behalf that financial assistance will be requested."

Le 19 août 1968 la Commission recevait une lettre émise le 15 août par M. Gibson, celle-ci contenait des plaidoiries écrites au nom de l'appelant. Le second paragraphe de cette lettre dit:

"It is not possible, for financial reasons, for me to appear before the Board on Mr. Caudill's behalf, but he wishes to appear himself, and has made an application for financial assistance in this regard. He will not be calling witnesses."

Avant l'audition de l'appel du 4 septembre 1968 la Commission n'a reçu aucune demande d'aide financière au bénéfice de M. Caudill.

No request for financial assistance was received by the Board in respect of Mr. Caudill prior to the hearing of the appeal on September 4, 1968.

By letter dated September 12, 1968 and received by the Board on September 16, 1968, Mr. Gibson objected to the manner in which this appeal had been handled. He drew the Board's attention to the fact Mr. Caudill had applied for financial assistance, that the requisite forms had been filed with Mr. Robertson, the Special Inquiry Officer for forwarding to the Board and also that he (Mr. Gibson) had informed the local Immigration authorities in Winnipeg that Mr. Caudill himself wished to appear before the Board if financial assistance would be forthcoming. Mr. Gibson stated also that he was told that the decision whether or not to grant financial assistance would be communicated to his client. In fact, Mr. Caudill never did receive a reply from either the Board or the Department concerning his application for assistance and he was therefore unable to attend the hearing. In his same letter Mr. Gibson also pointed out that he did not receive a copy of the respondent's written submission until September 5, one day after the date set for the hearing of the appeal.

The Board granted financial assistance to Mr. Caudill in order that he might be present, together with his counsel, at the hearing of the Motion on October 31, 1968.

The appeal was heard by the Immigration Appeal Board on September 4, 1968. Neither the appellant nor his counsel was present at the appeal hearing although written submissions were received on his behalf. The respondent did not appear for the appeal hearing but relied upon written submissions which were forwarded to the Board. After considering the record before it, including the written submissions of both the appellant and respondent the Board dismissed the appeal and directed that pursuant to Section 15(1) of the Immigration Appeal Board Act the deportation order be executed as soon as practicable.

Counsel for the appellant filed a Notice of Motion dated September 19, 1968 with the Board. The Notice of Motion was in the following terms:

- "1. The hearing of the appellant's appeal before the Board be re-convened in order to allow oral representation to be made to the Board on behalf of the appellant who was unable to make such representations at the original hearing of the appeal because:
 - (a) his application for financial assistance to travel to Ottawa for the hearing was not transmitted to the Board although it was submitted to Special Inquiry Officer L. Robertson by the appellant, and

Dans une lettre datée du 12 septembre 1968, reçue par la Commission le 16 septembre 1968, M. Gibson protestait contre la façon dont l'appel a été rendu. Il a attiré l'attention de la Commission sur le fait que M. Caudill a rempli une demande d'aide financière et que le formulaire prescrit a été déposé auprès de M. Robertson, enquêteur spécial, afin qu'il le transmette à la Commission, et que lui-même (M. Gibson) a informé les autorités de l'immigration à Winnipeg que M. Caudill désirait comparaître devant la Commission si l'aide financière arrivait sous peu. M. Gibson a déclaré qu'il lui a été répondu que la décision relative à l'octroi de l'aide financière serait communiquée à son client. Quant à la demande d'aide financière, M. Caudill, en fait, n'a jamais reçu de réponse de la Commission ni du Ministère, par conséquent il n'a pu comparaître à l'audition. Dans la même lettre M. Gibson fait remarquer qu'il n'a reçu la copie de la plaidoirie écrite de l'intimé que le 5 septembre, soit un jour après la date fixée pour l'audition de l'appel.

La Commission a accordé l'aide financière à M. Caudill afin qu'assisté de son conseiller il puisse comparaître le 31 octobre 1968 à l'audition de la requête.

La Commission d'appel de l'immigration a entendu l'appel le 4 septembre 1968. Ni l'appelant, ni son conseiller n'était présent à l'audition de l'appel, cependant la Commission a reçu une plaidoirie écrite au nom de l'appelant. Après examen de la preuve devant elle, preuve comprenant les plaidoiries de l'appelant et de l'intimé, la Commission a rejeté l'appel et a ordonné qu'en vertu de l'article 15(1) de la Loi sur la Commission d'appel à l'immigration l'ordonnance d'expulsion soit exécutée aussitôt que possible.

Le conseiller de l'appelant a déposé auprès de la Commission un avis de requête daté du 19 septembre 1968. Cet avis de requête disait:

- "1. The hearing of the appellant's appeal before the Board be re-convened in order to allow oral representation to be made to the Board on behalf of the appellant who was unable to make such representations at the original hearing of the appeal because:
 - (a) his application for financial assistance to travel to Ottawa for the hearing was not transmitted to the Board although it was submitted to Special Inquiry Officer L. Robertson by the appellant, and
 - (b) a copy of the respondent's written submission was not received by the appellant from the respondent until the day after the original hearing.

(b) a copy of the respondent's written submission was not received by the appellant from the respondent until the day after the original hearing.

2. In the alternative, that the deportation order affecting the appellant be quashed, or the execution thereof stayed, pursuant to section 15 of the Immigration Appeal Board Act, on the ground that:

- (a) the appellant did not have a fair hearing of his appeal, being deprived of the opportunity to present his case fully before the Board, and
- (b) if the deportation order is executed the appellant is likely to be punished for activities of a political character, and to suffer unusual hardship in the United States."

Mr. Gibson told the Board that he was before it on two separate Motions. The first was a Motion to reopen the hearing of the previous sitting of the Board in order to complete the case. The second Motion, in the event the Board should hold it does not have jurisdiction to reopen the hearing, is an independent Motion under Section 15 of the Immigration Appeal Board Act to have the deportation order quashed or for a stay of execution. He asked that he be permitted to reserve his right to argue the second Motion in the event the Board should hold against him on the first one. The Board agreed to his request.

Mr. Gibson submitted that the Board had jurisdiction to reopen the hearing of an appeal which it had already decided. He referred the Board to its decision on a Motion to reopen the Tsantili (Iliopoulos) case. In that case the Board in its reasons for disposition of the Motion said, *inter alia*

"However the Board is continuing, its jurisdiction is continuing and before its order is executed nothing precludes or bars an appellant from filing with the Board a motion requesting an order to reopen and it will be for the applicant to show that in his case very special circumstances warrant such an order to reopen."

2. In the alternative, that the deportation order affecting the appellant be quashed, or the execution thereof stayed, pursuant to section 15 of the Immigration Appeal Board Act, on the ground that:

- (a) the appellant did not have a fair hearing of his appeal, being deprived of the opportunity to present his case fully before the Board, and
- (b) if the deportation order is executed the appellant is likely to be punished for activities of a political character, and to suffer unusual hardship in the United States."

M. Gibson a déclaré qu'il présentait à la Commission deux requêtes différentes. Dans la première requête il demande à la Commission de réouvrir l'instance afin de compléter la preuve. Mais si la Commission maintient qu'elle n'a pas la compétence de reprendre l'audition, par la seconde requête il demande que la Commission annule l'ordonnance d'expulsion ou surseoie à son exécution en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration. Il a demandé que lui soit accordé le droit de déposer la deuxième si la première était refusée.

M. Gibson a allégué que la Commission a la compétence de réouvrir l'instance d'un appel sur lequel elle a déjà statué. Il a renvoyé la Commission à sa décision relative à une requête de réouverture dans l'affaire Tsantili (Iliopoulos). Dans les motifs qui ont amené la décision la Commission a déclaré à l'égard de la requête:

"However the Board is continuing, its jurisdiction is continuing and before its order is executed nothing precludes or bars an appellant from filing with the Board a motion requesting an order to reopen and it will be for the applicant to show that in his case very special circumstances warrant such an order to reopen."

Le conseiller de l'appellant a soutenu que cette affaire présente des circonstances particulières. La première est que, en pratique, mais non en droit, l'appellant s'est vu privé de l'occasion d'être présent à l'audition du premier appel en conséquence il n'a pas pu ni répondre aux arguments avancés contre lui ni développer ses propres arguments. A ceci s'ajoute le fait que le conseiller de l'appellant a reçu l'exposé de l'intimé trop tard pour y répondre par

Appellant's counsel argued that special circumstances did exist in the instant case. The first special circumstance was that the appellant was deprived in a practical (not legal) sense of the opportunity to be present at the original appeal hearing and therefore was unable to meet the arguments made against him, and was also unable to elaborate on his own arguments. This coupled with the fact that the respondent's written submissions were not received by appellant's counsel until too late to respond in written form, meant that the respondent's case was put fully to the Board whereas the appellant's case was put partially but not completely. The appellant wished to be present at the hearing of his appeal and if he had been present he would have presented two documents to the Board which were not available to him at the time of the Special Inquiry but were in his possession prior to the date set for the appeal hearing. These two documents were

- (a) the High School record of the appellant and
- (b) a classification and assignment test results relating to Mr. Caudill, dated July 1967.

It was Mr. Gibson's contention that if these two documents were before the Board when it heard the original appeal that they would have resulted in the Board coming to the conclusion the Special Inquiry Officer's personal assessment of the appellant was wrong.

Furthermore that in the written submission made to the Board in respect of Mr. Caudill the operation of Section 15 of the Immigration Appeal Board Act was not raised as the plan was to have the appellant come to the Board and explain fully why he should not be returned to the United States. By depriving him of this opportunity the appellant had been deprived of the right to have his case heard.

Counsel for the respondent agreed that there was no doubt that the appellant wished to be at the hearing of his appeal and it was lack of funds which had prevented him from being present. However he argued that the appellant's non-appearance due to lack of funds was not a ground to reopen the hearing of the appeal. In counsel's submission the applicant on this motion had to go further and satisfy the Board that what he would have said at the appeal hearing would have had an important influence on the Board in making its decision on the Appeal. The two documents to which reference has already been made would not be likely to have had any real influence on the Board's decision when it heard the appeal initially. The evidence the appellant would have given as it appears from the material filed on the motion would not have had an important influence on the Board.

écrit, ce qui signifie que l'intimé a présenté un dossier incomplet. L'appelant désirait être présent à l'audition de son appel et s'il y avait été présent il aurait présenté à la Commission deux documents qu'il ne possédait pas à l'époque de l'enquête spéciale; par contre, ceux-ci sont parvenus avant la date fixée pour l'audition de l'appel. Ces documents étaient:

- (a) dossier scolaire relatif aux études secondaires de l'appelant
- (b) les résultats d'une épreuve de classification et de désignation subie par M. Caudill (documents datés du mois de juillet 1967)

M. Gibson a soutenu que si on avait déposé ces deux documents auprès de la Commission lors du premier appel la Commission aurait conclu à l'inexactitude de l'évaluation établie par l'enquêteur spécial au titre "personnalité".

De plus, dans la plaidoirie écrite présentée à la Commission au nom de l'appelant, M. Gibson ne demandait pas à la Commission d'examiner l'affaire sous l'article 15 de la Loi sur la Commission d'appel de l'immigration car l'appelant avait prévu de venir exposer devant la Commission les motifs qui l'empêchaient de retourner aux Etats-Unis. Puisqu'on ne lui a pas permis de le faire, l'appelant s'est vu privé du droit d'avoir sa cause entendue.

Le conseiller de l'intimé a volontiers reconnu que l'appelant désirait comparaître en personne à l'audition de son appel et que ce sont des difficultés financières qui l'en ont empêché. Toutefois il a soutenu que le défaut de comparution en personne causé par un manque de fonds ne constitue pas un motif pour réouvrir une instance d'appel. Dans la plaidoirie du conseiller, le requérant doit aller plus loin et convaincre la Commission de l'importance de ce qu'il aurait dit pour l'établissement de la décision relative à l'appel devant la Commission. Il ne semble pas que les deux documents cités ci-dessus auraient réellement influé sur la décision relative à l'appel entendu pour la première fois par la Commission. D'après les pièces déposées pour la requête il appert que la preuve qui aurait été faite n'aurait pas fortement influé sur la décision de la Commission.

De plus, M. Thurm a avancé que la question de savoir si l'évaluation de M. Caudill avait été équitable était hors de propos pendant l'examen d'une requête de réouverture d'instance. Il a fait remarqué que seul l'article 34(3)(f) du Règlement sur l'immigration visait l'évaluation attendu que les articles 34(3)(e); 34(3)(f); 28(2) et 29(1) du Règlement sur l'immigration fondaient l'ordonnance d'expulsion. L'article 34(3)(e) ou 34(3)(f) empêcherait M. Caudill de bénéficier des dispositions dérogatoires relatives au visa (Art. 34 du Règlement sur l'immigration).

Mr. Thurm submitted further that the question whether or not Mr. Caudill has been properly assessed was not relevant on a motion to reopen. He pointed out that an assessment is relative only to Section 34(3)(f) of the Immigration Regulations, Part I whereas the deportation order was based on Sections 34(3)(e), 34(3)(f), Section 28(2) and Section 29(1) of the Immigration Regulations, Part I. Either Section 34(3)(e) or 34(3)(f) would disqualify Mr. Caudill from the visa waiver provisions in Section 34 of the said regulations.

Counsel for the respondent stated that if the Board has not considered Section 15 when it dealt with the appeal originally then there was no real alternative but for the Board to direct the reopening. He assumed however that the Board in dealing initially with the appeal would have followed its usual practice and considered the application of Section 15.

The Board has jurisdiction to reopen the hearing of an appeal - Tsantili (Iliopoulos) (1969 I.A.C.). It remains therefore to consider whether there are special circumstances in the instant case which warrant a reopening being ordered.

From the relevant facts set out earlier in these reasons it is quite apparent that Mr. Caudill always intended to come to the hearing of his appeal, provided financial assistance was made available to him. He applied for such assistance through the proper channels but for some unexplained reason the application was not received by the Board prior to the appeal hearing on September 4, 1968. While of course it is not possible to state with certainty that financial assistance would have been granted in this case, the fact remains an application was made and should have been considered before the appeal was heard. If the application had been refused counsel for the appellant might well have adopted some other method of presenting the appeal, for example, the appointment of an Ottawa agent. On the other hand and insofar as this Motion is concerned, the Board finds that in the circumstances of this particular case the failure to forward the application for financial assistance in time for it to be considered and the result of such consideration notified to the appellant before the date set for the appeal hearing is such a special circumstance as warrants it ordering the appeal hearing to be reopened. If Mr. Caudill had been present and testified at the hearing of his appeal it is not possible on the hearing of this Motion to say that his testimony may not have had some relevancy or bearing on the exercise of the Board's discretion under Section 15 of the Immigration Appeal Board Act.

The Motion is therefore allowed and the appeal hearing is hereby ordered to be reopened.

Le conseiller de l'intimé a déclaré que si au cours du premier appel la Commission n'a pas étudié l'affaire sous l'article 15 il ne restait plus à celle-ci que d'ordonner la réouverture. Toutefois, il a présumé que lorsque pour la première fois la Commission a considéré cet appel elle a suivi sa pratique coutumière et a étudié cette affaire sous l'article 15.

La Commission a la compétence de réouvrir une instance d'appel (voir Tsantili (Iliopoulos) (1969 A.I.A.)). En conséquence il reste à savoir si dans cette affaire des circonstances spéciales justifient une ordonnance de réouverture d'instance.

D'après les faits pertinents exposés plus haut dans ces motifs, il appert que sous réserve qu'une aide financière lui soit dispensée, M. Caudill a toujours eu l'intention de se présenter à l'audition de son appel. Par la voie administrative régulière il a demandé cette aide mais à cause d'un retard inexplicable la Commission n'a pas reçu la demande avant le 4 septembre 1968, date fixée pour l'audition de l'appel. Bien qu'il ne soit pas possible de déclarer avec certitude que dans ce cas la demande aurait été accordée il n'en reste pas moins que la demande aurait dû être étudiée avant que l'appel ne soit entendu. Si la Commission avait refusé la demande le conseiller pour l'appelant aurait pu prendre d'autres dispositions pour présenter l'appel, par exemple nommer un agent à Ottawa. En deuxième lieu, dans les circonstances de cette affaire, le fait que la demande n'ait pas été expédiée à temps pour permettre à la Commission de la considérer et d'aviser l'appelant du résultat de sa considération, ceci avant la date fixée pour l'audition de l'appel, constitue, déclare la Commission, une circonstance spéciale qui justifie la réouverture de l'instance. Si, à l'audition de son appel M. Caudill avait comparu en personne et avait témoigné il n'est pas possible de prétendre d'après l'audition de la requête, que son témoignage n'aurait pas contenu quelque fait ou motif qui en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration aurait amené la Commission à exercer son pouvoir discrétionnaire.

En conséquence la requête est accueillie et la Commission ordonne par la présente que l'instance d'appel soit réouverte.

Le conseiller de l'appelant n'a pas fortement contesté la validité de l'ordonnance d'expulsion. Pendant l'enquête l'appelant a admis avoir occupé un emploi sans l'approbation écrite d'un fonctionnaire du ministère (p. 19 de l'enquête). A l'occasion de l'évaluation, subséquente à sa demande de résidence permanente présentée le 1^{er} mai, il n'a pas obtenu le minimum d'unités requises (50 unités). A l'enquête il a admis n'être en possession ni d'une lettre de pré-examen ni d'un certificat médical (p. 5 de l'enquête); il contrevient ainsi au Règlement sur l'immigration.

The legality of the deportation order was not seriously contested by counsel for the appellant. The appellant at his Inquiry admitted he had taken employment without the written approval of an Immigration Officer (Inquiry, page 9). He did not obtain the minimum number of units of assessment (fifty points) when assessed by an Immigration Officer on the basis of his application for permanent admission dated May 1, 1968. He admitted at the Inquiry that he was not in possession of a letter of pre-examination or a medical certificate as required by the Immigration Regulations (Inquiry, page 5).

The question whether the Board has the authority or jurisdiction to make a reassessment of an appellant was decided in the appeal of Gioulekas v the Minister of Manpower and Immigration 1969 IAC. Mr. Gioulekas was assessed in accordance with Section 34 of the Immigration Regulations, Part I, and received a total of forty-five units. His counsel on appeal argued that the Board had the power to review the assessment and if necessary the power to revise it. The Board in its written reasons stated on this point "The appellant was not present at the hearing and his counsel did not in the opinion of the Board, considering the evidence before it, show that the Immigration Officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. It therefore in the instant case declines to review the assessment and substitute its own opinion for that of the Immigration Officer."

In the instant case there is no evidence to support a finding that the Immigration Officer acted upon a wrong principle or was manifestly wrong. He based his assessment on the information given him in the application for permanent residence filed by the appellant on May 1, 1968 and by personal interview. If the appellant did not provide full, true and complete information leading up to his assessment he cannot now come before the Board to complain that he was assessed unfairly.

The Board finds therefore that all grounds in the deportation order are valid. It therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

It should be pointed out that one valid ground in a deportation order is sufficient to uphold such order even if other grounds set out in the order are invalid: Espaillet-Rodriguez (1964) S.C.R. 3; De Marigny v. Langlais (1948) S.C.R. 155.

Having dismissed the appeal under Section 14 of the Immigration Appeal Board Act the Board now has to determine whether to exercise its discretion under the provisions of Section 15 of the said Act. The applicable portion of Section 15 reads as follows:

La question de savoir si la Commission a l'autorité ou la compétence de ré-évaluer un appelant a été tranchée dans l'affaire Gioulekas c. le Ministre de la Main-d'oeuvre et de l'immigration 1969 I. A. C. En conformité de l'article 34 du Règlement sur l'immigration, M. Gioulekas a été évalué et a obtenu quarante-cinq unités. En appel, le conseiller de l'appelant a soutenu que la Commission a le pouvoir de ré-examiner une évaluation et au besoin de la modifier. La Commission, dans ses raisons pour jugement, a déclaré à ce sujet:

"The appellant was not present at the hearing and his counsel did not in the opinion of the Board, considering the evidence before it, show that the Immigration Officer came to a manifestly wrong conclusion or had proceeded upon a wrong principle. It therefore in the instant case declines to review the assessment and substitute its own opinion for that of the Immigration Officer."

Dans cette affaire, aucune preuve n'indique que le fonctionnaire à l'immigration a agi au nom d'un principe erroné ou que son évaluation était manifestement erronée. Il a évalué l'appelant d'après l'entrevue qu'il a eu avec celui-ci et d'après les renseignements que lui ont fourni la demande de résidence permanente déposée le 1^{er} mai 1968 par l'appelant. Si l'appelant à l'occasion de l'évaluation, n'a pas fourni des renseignements complets et vrais, il ne peut à présent venir devant la Commission et déposer une plainte à l'effet qu'il n'a pas reçu une évaluation équitable.

En conséquence, la Commission déclare que tous les motifs de l'ordonnance d'expulsion sont valides. En conséquence, en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration elle rejette l'appel.

Notons qu'un seul motif valide une ordonnance d'expulsion, même si tous les autres motifs sont invalides: Espaillat-Rodriguez (1964) R.C.S. 3; De Marigny c. Langlais (1948) R.C.S.155.

Après avoir rejeté l'appel sous l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission doit déterminer si dans cette affaire elle doit exercer son pouvoir discrétionnaire prévu à l'article 15 de la Loi. La partie pertinente de l'article 15 dit:

"15. (1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que

- "15.(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that
- (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,
- the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

Mr. Caudill is a citizen of the United States of America. He is nineteen years of age and unmarried. His mother is a citizen of and resides in the United States. He attended school for twelve years, completing High School. On leaving school he enlisted in the United States Marine Corps and was absent without leave from that Corps when he came to Canada on April 17, 1968. He did not take any technical or vocational training after leaving school. He is not a landed immigrant. He has no relatives in Canada and has been here only a short time. He has no roots in this country. There is no evidence before the Board that reasonable grounds exist for believing that if returned to the United States he will be punished for activities of a political character. He may well be liable to punishment for being an absentee without leave from the United States Marine Corps. Such punishment is certainly not the result of political activities nor can it be construed as being "unusual hardship".

The fact that his opinions regarding the involvement of his country in the war in Viet Nam differ from those in authority in his home country does not, in the opinion of the Board, constitute the existence of such compassionate or humanitarian grounds as to warrant the granting of special relief.

b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu

(i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou

(ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,

la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement."

M. Caudill est citoyen des Etats-Unis. Il a dix neuf ans et est célibataire. Sa mère, citoyenne des Etats-Unis, vit dans ce pays. Il a douze années de scolarité et a terminé son cours secondaire. Après avoir quitté l'école il s'engagea dans le United States Marine Corps; il était absent sans motif quand il est arrivé au Canada le 17 avril 1968. Il n'est pas un immigrant reçu. Il n'a pas de parentée au Canada et n'y est que depuis peu de temps. Il n'a pas établi de lien au Canada. Aucune preuve n'a été administrée devant la Commission à l'effet qu'il existe de motifs raisonnables de croire que s'il retournait aux Etats-Unis il serait puni pour des activités d'un caractère politique. Il encourt certainement une punition pour être porté absent à l'appel du United States Marine Corps. Cette punition ne résulte pas de l'effet d'activités d'un caractère politique; elle ne peut pas être non plus interprétée comme "graves tribulations".

Le fait que ses opinions sur l'intervention de son pays dans la guerre au Viet Nam vont à l'encontre de celles affichées par son pays ne constitue pas un motif de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial.

En conséquence, la Commission se refuse à exercer son pouvoir discrétionnaire prévu à l'article 15 et ordonne que l'ordonnance d'expulsion soit exécutée aussitôt que possible.

Ont souscrit: Jean-Pierre Houle et J.A. Byrne

Pour l'appelant: Me R.D. Gibson;
pour l'intimé: Me N.M. Thurm.

The Board therefore declines to exercise its discretion under Section 15 and directs that the deportation order be executed as soon as practicable.

Concurred in by: Jean-Pierre Houle and J.A. Byrne

For the appellant: R.D. Gibson, Barrister & Solicitor;
for the respondent: N.M. Thurm, Barrister & Solicitor.

13.

Mohammed RAFIK,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 4, 1968;
File: 68-6002.

Coram: A.B. Weselak, Jean-Pierre Houle, J.A. Byrne.

Special Inquiry Officer - whether discretion to stay execution of deportation order - notice of appeal - Board's jurisdiction to consider appeal under sections 14 and 15 of the Immigration Appeal Board Act. - Immigration Act: 19(1)(e)(vi).

Held: That no discretion exists in the Special Inquiry Officer to stay the execution of an order of deportation, as the Immigration Act would clearly have spelled out such discretion if it had been Parliament's wish to confer it; - a single notice of appeal is sufficient for the Board to consider the appeal under both Section 14 (fact and law) and Section 15 (equity) of the Immigration Appeal Board Act, even though the appellant does not contest the legal validity of the deportation order.

The judgment of the Board was delivered by:

A.B. Weselak:

The order of deportation reads:

- "(i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under subparagraph (vi) of paragraph (e) of subsection (1) of Section 19 of the Immigration Act in that you entered Canada as a non-immigrant and remain therein after ceasing to be a non-immigrant or to be in the particular class in which you were admitted as a non-immigrant,
- (iv) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

The appellant is aged twenty-six, single, claims to be a Bio-Chemist and to have received a B. Sc. degree in New Zealand. These claims were not substantiated by any documentary proof. He further stated he had been employed for three years in a medical laboratory in New Zealand. In Canada he was employed by the Regina General Hospital, St. Joseph's Hospital in London, Ontario, Children's Hospital in Winnipeg and the Department of Public Health in Regina.

13.

Mohammed RAFIK,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration, intimé.

Date de la décision: le 4 décembre 1968;

Dossier: 68-6002.

Coram: A.B. Weselak, Jean-Pierre Houle, J.A. Byrne.

Enquêteur spécial - discrétion pour surseoir à l'exécution d'une ordonnance d'expulsion - avis d'appel - La Commission a compétence pour connaître d'un appel en vertu des articles 14 et 15 de la Loi sur la Commission d'appel de l'immigration. Loi sur l'immigration: 19(1)(e)(vi).

Arrêt: L'enquêteur spécial n'est pas investi de la discrétion de surseoir à l'exécution d'une ordonnance d'expulsion. Si le Parlement avait voulu lui conférer semblable compétence, il l'aurait clairement exprimé; la Commission peut connaître d'un appel conformément aux articles 14 (fait et droit) et 15 (équité) de la Loi sur la Commission d'appel de l'immigration, sur un simple avis d'appel lors même que l'appellant ne s'attaque pas à la validité de l'ordonnance d'expulsion.

Le jugement de la Commission fut rendu par:

A.B. Weselak:

L'ordonnance d'expulsion est la suivante:

- "(i) you are not a Canadian citizen,
- (ii) you are not a person having Canadian domicile,
- (iii) you are a person described under subparagraph (vi) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you entered Canada as a non-immigrant and remain therein after ceasing to be a non-immigrant or to be in the particular class in which you were admitted as a non-immigrant,
- (iv) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

L'appellant, âgé de 26 ans, célibataire, prétend être un biochimiste et avoir reçu un B.Sc. en Nouvelle-Zélande. Ces prétentions ne sont étayées d'aucune preuve documentaire. Il a de plus affirmé qu'il avait été employé pendant trois ans par un laboratoire médical en Nouvelle-Zélande. Au Canada il a été à l'emploi de la Regina General Hospital, de la St. Joseph's Hospital, à London, Ontario, de la Children's Hospital, à Winnipeg et du ministère de la Santé publique à Régina.

The appellant arrived in Canada on December 11, 1966, and was allowed entry to Canada as a non-immigrant until June 15, 1967. He took employment on April 17, 1967, without permission from an Immigration officer.

Counsel for the appellant in his written submissions and oral presentations challenged the validity of the order on the grounds that:

1. At the Special Inquiry, he had requested a stay of the Deportation Order and that the Special Inquiry Officer had failed to consider exercising his discretion in this respect and cited the case of M.A.F. de Marigny v. J.M. Langlais, (1948) S.C.R. 155, in support of his argument.

The Board can find nothing in this case to support counsel's argument. It can also find nothing in the Immigration Act or Regulations thereunder which authorizes a Special Inquiry Officer to stay a Deportation Order. Had Parliament intended to give this authority to a Special Inquiry Officer, it would have expressly done so as it has done in Section 15 of the Immigration Appeal Board Act in giving the Board such authority.

2. If a person fully agreed with the law and fact of the finding of a Special Inquiry Officer, then they could not appeal to the Board on the basis of humanitarian or compassionate considerations.

The Board is of the opinion that when an appeal is filed, the appellant seeks relief under Section 15 of the Immigration Appeal Board Act in fact and law and also seeks relief under Section 14 in equity and the filing and service of the Notice of Appeal is sufficient for the Board to consider the appeal under both Sections.

The Board considering the evidence adduced at the Inquiry and received at the hearing finds that the Deportation Order was made in accordance with the Immigration Act and Regulations thereunder and therefore dismisses the appeal under Section 14 of the Immigration Appeal Board Act.

In considering this appeal under Section 15, the Board must consider whether the appellant falls within the provisions of Section 15(b) of the Immigration Appeal Board Act which reads:

"15(b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to

L'appelant est arrivé au Canada le 11 décembre 1966 et il a reçu la permission d'entrer au Canada comme non-immigrant jusqu'au 15 juin 1967. Il a pris un emploi le 17 avril 1967 sans la permission d'un fonctionnaire à l'immigration.

Le procureur de l'appelant a contesté la validité de l'ordonnance dans son exposé écrit et dans son argument oral sous prétexte que:

1. Au cours de l'enquête, il a demandé à l'enquêteur spécial de surseoir à l'ordonnance d'expulsion et celui-ci a refusé d'exercer sa discrétion à cet égard et il a cité l'affaire M.A.F. de Marigny c. J.M. Langlais (1948) R.C.S. 155, à l'appui de son argument.

La Commission déclare que rien dans cette affaire n'appuie l'argument du procureur. La Loi sur l'immigration et son Règlement n'autorisent en rien l'enquêteur spécial à surseoir à une ordonnance d'expulsion. Si le Parlement avait voulu conférer semblable autorité à un enquêteur spécial, il l'aurait clairement exprimé, comme il l'a fait dans l'article 15 de la Loi sur la Commission d'appel de l'immigration qui attribue cette autorité à la Commission.

2. Si une personne accepte en droit et en fait la décision de l'enquêteur spécial, elle ne peut interjeter appel devant la Commission pour des motifs de pitié ou des considérations d'ordre humanitaire.

La Commission estime que lorsqu'un appel est déposé l'appelant cherche à obtenir un redressement en fait et en droit en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration et il cherche aussi à obtenir un redressement en équité en vertu de l'article 15. Il suffit de déposer un avis d'appel et de signifier l'appel pour que la Commission le considère en vertu des deux articles.

La Commission, ayant pris connaissance de la preuve administrée à l'enquête et reçue à l'audition conclut que l'ordonnance d'expulsion a été faite en conformité de la Loi et du Règlement sur l'immigration et rejette donc l'appel en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration.

La Commission doit ensuite déterminer si l'appelant est visé par les dispositions de l'article 15(b) de la Loi sur la Commission d'appel de l'immigration qui dit ceci:

"15(b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu

- (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or,
- (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief."

There was no evidence adduced that the appellant would be punished for activities of a political nature. The appellant came as a visitor, used various aliases and moved about to avoid detection. The record shows that he deceived not only the Immigration authorities but other persons as well.

No evidence was adduced to the effect that his return to New Zealand would cause unusual hardship; he was employed there and is still employable.

He claims to be engaged but no representations were received from his fiancée or her parents with whom he states he is residing.

As to compassionate and humanitarian grounds, he has no close relatives in Canada, no commitments nor has he established such roots here that uprooting would cause him anguish or hardship. Under this head the Board cannot find sufficient considerations that in its opinion warrant the granting of special relief.

The appeal under Section 15 of the Immigration Appeal Board Act is therefore dismissed and the Board directs that the Deportation Order be executed as soon as practicable.

Concurred in by: Jean-Pierre Houle and J.A. Byrne.

For the appellant: D. Fenwick, Barrister and Solicitor;
for the respondent: J. Pasman, Esq.

- (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
- (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial."

Il n'a pas été mis en preuve que l'appelant serait puni pour des activités d'un caractère politique. L'appelant est entré comme visiteur et il a utilisé plusieurs faux noms et s'est déplacé souvent afin d'éviter d'être reconnu. Le dossier démontre qu'il a trompé non seulement les autorités de l'immigration mais aussi d'autres personnes.

Il n'a pas été mis en preuve que son retour en Nouvelle-Zélande lui causerait de graves tribulations; il a déjà tenu un emploi dans ce pays et pourrait en trouver un autre.

Il affirme être fiancé mais la Commission n'a reçu aucune représentation de sa fiancée ou de ses parents chez qui il prétend demeurer.

Quant aux motifs de pitié et considérations d'ordre humanitaire, il n'a pas de proches parents au Canada, il n'a pas d'engagements et il n'a pas créé ici de liens qu'il ne pourrait rompre sans inquiétude et sans peine. La Commission estime qu'il n'y a pas de considérations suffisantes à ce titre pour accorder un redressement spécial.

L'appel est par conséquent rejeté en vertu de l'article 15 de la Loi sur la Commission d'appel de l'immigration et la Commission ordonne que l'ordonnance d'expulsion soit exécutée aussi tôt que faire se pourra.

Ont souscrit: Jean-Pierre Houle et J.A. Byrne

Pour l'appelant : M^{re} D. Fenwick;
pour l'intimé : M. J. Pasman.

14.

Giulio GRILLO,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: December 9, 1968;
File: 68-5638.

Coram: Jean-Paul Geoffroy, Vice-Chairman, A.B. Weselak, U. Benedetti.

An Immigration Officer shall examine every person who is seeking to come into Canada. - Application as an independent applicant or as a sponsored applicant - Improper assessment of an applicant - Examination null and void. - Immigration Act: 23 - Immigration Regulations: 33(1)(d), 34(3)(f).

Held: Pursuant to Section 23 of the Immigration Act, the Immigration Officer shall examine every person who is seeking admission into Canada.- Such an examination shall be in accordance with the relevant provisions of the Act and of the Regulations. The Statute and the Regulations provide for an examination made in accordance with the established norms, and these norms vary according to the actual status of the applicant. If the Immigration Officer errs on the status of the applicant, if he does not conduct a proper examination as prescribed by the Statute, then his examination is null and void and so is the Special Inquiry which does not rectify the misdirection made in examination.

The judgment of the Board was delivered by

Jean-Paul Geoffroy, Vice-Chairman:

The deportation order reads as follows:

- "1) vous n'êtes pas un citoyen canadien;
- 2) vous n'êtes pas une personne ayant acquis le domicile canadien;
- 3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:

14.

Giulio GRILLO,

appellant,

v.

Le Ministre de la Main-d'oeuvre et de l'immigration, intimé.

Date de la décision: le 9 décembre 1968.

Dossier: 68-5638

Coram: Jean-Paul Geoffroy, Vice-président, A.B. Weselak, U.Benedetti

Devoir du fonctionnaire à l'immigration d'examiner toute personne qui cherche à entrer au Canada. - Demande ès-qualité de requérant indépendant ou ès-qualité de parent nommément désigné. - Erreur sur l'état du requérant - examen vicié. - Loi sur l'immigration: 23; Règlement de l'immigration: 33(1)(d), 34(3)(f).

Arrêt: L'article 23 de la Loi sur l'immigration impose au fonctionnaire à l'immigration d'examiner toute personne qui cherche à entrer au Canada. Cet examen, pour être conforme à la Loi et au Règlement, consiste à apprécier les aptitudes de chaque requérant en regard des normes exigées. Ces dernières varient selon l'état du requérant: elles sont plus sévères lorsqu'il s'agit d'un requérant indépendant que lorsqu'il s'agit d'un parent nommément désigné. Une erreur sur l'état de la personne concernée, sur la qualité même du requérant, vicie totalement l'examen comme est viciée et nulle l'enquête spéciale qui suit et qui ne corrige pas l'erreur initiale.-

Le jugement de la Commission fut rendu par:

Jean-Paul Geoffroy, Vice-président:

L'ordonnance d'expulsion se lit:

- "1) vous n'êtes pas un citoyen canadien;
- 2) vous n'êtes pas une personne ayant acquis le domicile canadien;
- 3) vous êtes un membre de la catégorie interdite décrite à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous ne pouvez remplir ni observer les conditions ou prescriptions de la présente Loi ou des Règlements en raison du fait que:
 - a) selon l'avis d'un fonctionnaire à l'Immigration vous n'auriez pas été admis au Canada pour y résider en permanence si vous aviez subi un examen hors du Canada à titre d'immigrant indépendant et que votre

- a) selon l'avis d'un fonctionnaire à l'Immigration vous n'auriez pas été admis au Canada pour y résider en permanence si vous aviez subi un examen hors du Canada à titre d'immigrant indépendant et que votre admissibilité eût été établie conformément aux normes énoncées à l'Annexe "A", excluant le critère de l'emploi réservé tel que requis à l'alinéa (f) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration;
- b) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration;
- c) votre passeport ne contient pas de certificat médical dûment signé par un médecin du Ministère et que vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre tel que requis au paragraphe (1) de l'article 29 de la première partie des Règlements de la Loi sur l'Immigration."

The relevant facts are the following:

The appellant, age 57, is married but separated; he is an Italian citizen born in Tunisia. He is an electrician and has been in this trade up to 1961. Since that time, he has not been able to work for reasons of health and has lived in Algeria with his daughter and son-in-law. He came into Canada as a visitor in August, 1967. He was travelling with his daughter, his son-in-law and their two children who were admitted as immigrants. Before the expiration of his temporary stay, he applied for permanent residence. He was examined as an independent applicant and his application was refused because he could not meet the requirements set out in Part I of the Regulations.

It seems that the appellant has filed an application on or about November 20, 1967. This application is not in the record. The record contains a form 1008 signed by the appellant January 25, 1968, referring to class 33(1)(d), and forms O.S.8 and 1010. This last form is signed by his son-in-law and his daughter and is dated January 26, 1968.

The section 23 report mentions that the appellant was examined as an independent applicant under paragraph (f) of subsection (3) of section 34 of the Immigration Regulations, Part I. The deportation order also bears mention at sub-paragraph (a) of paragraph 3 that the appellant cannot be admitted as an independent immigrant since he does not meet the norms set out for this class of persons.

admissibilité eût été établie conformément aux normes énoncées à l'Annexe "A", excluant le critère de l'emploi réservé tel que requis à l'alinéa (f) du paragraphe (3) de l'article 34 de la première partie des Règlements de la Loi sur l'Immigration;

- b) vous n'êtes pas en possession d'un visa d'immigrant valable et non périmé tel que requis au paragraphe (1) de l'article 28 de la première partie des Règlements de la Loi sur l'Immigration;
- c) votre passeport ne contient pas de certificat médical dûment signé par un médecin du Ministère et que vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre tel que requis au paragraphe (1) de l'article 29 de la première partie des Règlements de la Loi sur l'Immigration."

Les faits dans cette affaire sont les suivants:

L'appelant, âgé de 57 ans, marié mais séparé, est un citoyen italien né en Tunisie. Il est électricien et a exercé ce métier jusqu'en 1961. Depuis cette date, il n'a pu travailler pour cause de maladie et est demeuré en Algérie avec sa fille et son gendre. Il est entré au Canada comme visiteur au mois d'août 1967, accompagnant sa fille et son gendre et leurs enfants qui, eux, furent admis comme immigrants. Avant l'expiration de son permis de séjour, il présenta une demande de résidence permanente. Il fut examiné comme requérant indépendant et refusé parce qu'il ne rencontrait pas les exigences du Règlement No. I.

L'appelant aurait soumis une demande le ou vers le 20 novembre 1967. Cette demande n'est pas au dossier. On trouve dans celui-ci une formule 1008 signée par l'appelant le 25 janvier 1968 référant à la catégorie 33(1)(d) et une formule O.S.8 et 1010. Cette dernière est signée par son gendre et sa fille et porte la date du 26 de janvier 1968.

Le rapport prévu à l'article 23 mentionne que l'appelant a été examiné comme requérant indépendant en vertu de l'article 34, paragraphe 3, alinéa "F" du Règlement No. I sur l'Immigration. De même, l'Ordonnance d'expulsion porte au Paragraphe 3, alinéa "a" que l'appelant ne peut être admis à titre d'immigrant indépendant parce qu'il ne rencontre pas les critères établis visant cette catégorie de personnes.

Section 23 of the Immigration Act holds that the Immigration officer must examine all persons seeking to enter Canada. If this examination is to be in accordance with the Act and the Regulations thereunder, he must assess each applicant's qualifications in light of the prescribed norms. These norms vary according to the applicant's status: they are more stringent in the case of an independent applicant than in the case of an applicant who is a nominated relative. An error on the status of the person concerned, on his status as an applicant, totally invalidates the examination and also invalidates the resulting inquiry if such inquiry does not correct the error.

In the present case, the appellant was a nominated relative and his admission was sponsored by his daughter and son-in-law. He was considered by the immigration officer and by the Special Inquiry Officer, and further referred to in the deportation order, as an independent applicant. For this reason, the Board holds that the appeal must be allowed.

Concurred in by: A.B. Weselak and U. Benedetti.

For the appellant: Me Michael Berger, Q.C.;
for the respondent: Me P. Landry, advocate.

L'article 23 de la Loi sur l'immigration impose à l'officier d'immigration d'examiner toute personne qui cherche à entrer au Canada. Cet examen, pour être conforme à la Loi et aux Règlements, consiste à apprécier les aptitudes de chaque requérant en regard des normes exigées. Ces dernières varient selon le statut du requérant: elles sont plus sévères lorsqu'il s'agit d'un requérant indépendant que lorsqu'il s'agit d'un parent nommé désigné. Une erreur sur le statut de la personne concernée, sur la qualité même du requérant, vicie totalement l'examen comme aussi est viciée et nulle l'enquête spéciale qui suit et qui ne corrige pas l'erreur initiale.

Dans le cas présent, l'appelant était un parent nommé désigné dont l'admission était parrainée par son gendre et sa fille. Il a été considéré par l'Officier d'immigration et l'Enquêteur spécial et, de plus, désigné dans l'Ordonnance d'expulsion, comme un requérant indépendant. Pour ce, la Commission décide d'accepter l'appel.

Ont souscrit: A.B. Weselak et U. Benedetti.

Pour l'appelant: Me E. Michael Berger, c.r.;
pour l'intimé: Me P. Landry.

15.

Michelle Auberte MAYOUTE,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: January 14, 1969;

File: 68-5959

Coram: Miss J.V. Scott, Chairman, Jean-Paul Geoffroy, Gérard Legaré.

Persons who may be allowed to enter and remain in Canada as non-immigrants.-
 Visa or letter of pre-examination, medical certificate - not required -
 Persons exempted from the requirements of S. 28(3)(4), of Immigration
 Regulations Part 1. - Immigration Act: 7 (1)(h).

Held: The appellant falls squarely within S. 7(1)(h) of the Immigration Act which deals with persons who may be allowed to enter and remain in Canada as non-immigrants, namely, "persons engaged in a legitimate profession, trade or occupation entering Canada or who having entered, are in Canada for the temporary exercise of their respective callings".- Citizens of France are exempted by the Minister pursuant to the powers given to him by Section 28(4) of the Immigration Regulations, Part I, from the requirements of Section 28(3) - A non-immigrant does not require the medical certificate referred to in S. 29(1) of the Immigration Regulations, Part I.

The judgment of the Board was delivered by:

Miss J.V. Scott, Chairman:

The order of deportation reads:

- "1) vous n'êtes pas une citoyenne Canadienne;
- 2) vous n'êtes pas une personne qui a acquis le domicile Canadien;
- 3) vous êtes membre de la catégorie de personnes interdites décrites à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous n'observez pas ni ne remplissez quelques conditions ou prescriptions de la présente Loi ou des règlements n'étant pas en possession d'une lettre de pré-examen en la forme prescrite par le Ministre tel que requis au paragraphe (2) de l'article 28 des règlements sur l'Immigration, partie 1, et que son passeport ne contient pas de certificat médical dûment signé par un

15.

Michelle Auberte MAYOUTE,

appelante,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 14 janvier 1969;

Dossier: 68-5959

Coram: Mlle J.V. Scott, président, Jean-Paul Geoffroy, Gérard Legaré.

Les personnes qui peuvent entrer et demeurer au Canada à titre de non-immigrant - Visa, lettre de pré-examen - certificat médical - non-exigés - Les personnes qui ne sont pas soumises aux exigences de l'article 28 (3)(4) du Règlement de l'immigration, Partie I. - Loi sur l'immigration: 7(1)(h).

Arrêt: L'article 7(1)(h) de la Loi sur l'immigration s'applique très exactement à l'appelante - Cet article traite des personnes qui peuvent entrer et demeurer au Canada à titre de non-immigrant, nommément "les personnes pratiquant une profession, un commerce ou une occupation légitime qui entrent au Canada ou qui, étant entrées, sont dans ce pays pour l'exercice temporaire de leur état respectif" il peut être permis à ces personnes d'entrer et de demeurer au Canada, à titre de non-immigrants - En vertu des pouvoirs à lui conférés par l'article 28(4) du Règlement de l'immigration, Partie I, le Ministre a soustrait les résidents français aux prescriptions de l'article 28(3). - Un non-immigrant n'a pas besoin d'être porteur d'un certificat médical, tel que décrit au Règlement de l'immigration, Partie I.

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott, président:

L'ordonnance d'expulsion est la suivante:

- "1) vous n'êtes pas une citoyenne Canadienne;
- 2) vous n'êtes pas une personne qui a acquis le domicile Canadien;
- 3) vous êtes membre de la catégorie de personnes interdites décrites à l'alinéa (t) de l'article 5 de la Loi sur l'Immigration en ce que vous n'observez pas ni ne remplissez quelques conditions ou prescriptions de la présente Loi ou des règlements n'étant pas en possession d'une lettre de pré-examen en la forme prescrite par le Ministre tel que requis au paragraphe (2) de l'article 28 des

médecin du ministère et vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre, tel que requis au paragraphe (1) de l'article 29 des règlements sur l'Immigration partie 1."

The appellant was present at the hearing of her appeal, accompanied by her employer, Mme Lorraine Gagnon-Bélanger, who acted as her counsel and also testified on her behalf. The respondent, the Minister of Manpower and Immigration, was represented by M. Jacques Pépin.

The facts of this case are as follows: Mlle Michelle Auberte Mayoute, a citizen of France, born and brought up in Guadeloupe, aged 18, arrived in Canada to work as a domestic for her counsel, Mme Bélanger, pursuant to an arrangement made by that lady, with Mlle Irène Pelletier of the office of Canadian Manpower in Quebec City and a Mlle A. Adeline, principal of a school for the training of domestic workers in Guadeloupe, of which Miss Mayoute is a graduate.

It is unnecessary to set out in detail the somewhat complicated facts relating to this arrangement, though it should be stated that there is no doubt that Mme Bélanger acted in good faith throughout.

Mlle Mayoute arrived at Montreal Airport on October 19, 1968, in possession of a French passport bearing no visa for Canada. She travelled on a one way air ticket from Point à Pitre to Montreal. On her arrival, she was examined by an Immigration Officer and detained for an inquiry, which was held the next day - October 20, 1968, in the presence of her employer, Mme Bélanger, who acted as counsel.

During the course of the inquiry, appellant testified as follows, in reply to questions by M. Malouin, the Special Inquiry Officer: (page 6 of the Minutes of Inquiry)

"Q.- A cet examen hier, avez-vous demandé l'admission permanente ou temporaire?

R.- J'ai demandé de venir au Canada pour trois ans.

Q.- Pour quelle raison avez-vous demandé de demeurer au Canada pour trois ans?

R.- Pour travailler.

Q.- Aujourd'hui à cette enquête, demandez-vous l'admission permanente ou temporaire?

R.- Je ne sais pas, je suis venue ici de bonne foi pour travailler, peut-être que je demeurerai en permanence si je me plais ici.

règlements sur l'Immigration, partie 1, et que son passeport ne contient pas de certificat médical dûment signé par un médecin du ministère et vous n'êtes pas en possession d'un certificat médical en la forme prescrite par le Ministre, tel que requis au paragraphe (1) de l'article 29 des règlements sur l'Immigration partie 1."

L'appelante assistait à l'audition de son appel; elle était accompagnée de son employeur, Madame Lorraine Gagnon-Bélanger, qui agissait comme procureur et qui a témoigné en sa faveur. M. Jacques Pépin, occupait pour le ministre de la Main-d'oeuvre et de l'Immigration.

Les faits pertinents sont les suivants: Mlle Michelle Auberte Mayoute, citoyenne de France, âgée de 18 ans, est née et a été éduquée à la Guadeloupe. Elle est arrivée au Canada pour travailler comme domestique à l'emploi de son procureur, Mme Bélanger, à la suite d'une entente entre cette dame, Mlle Irène Pelletier, du bureau de la Main-d'oeuvre canadienne à Québec et Mlle A. Adeline, directrice d'une école de formation pour domestiques à Guadeloupe où Mlle Mayoute avait fait son cours.

Il n'est pas nécessaire de décrire en détail les faits assez complexes relatifs à cette entente, mais il faut dire que Mme Bélanger a sans aucun doute toujours agi de bonne foi.

Mlle Mayoute est arrivée à l'aéroport de Montréal le 19 octobre 1968 en possession d'un passeport français qui ne portait pas de visa candien. Elle était arrivée sur un aller-simple direct de Pointe-à-Pitre à Montréal. A son arrivée, elle a été examinée par un fonctionnaire à l'immigration et détenue aux fins d'une enquête qui a eu lieu le lendemain, 20 octobre 1968, en présence de son employeur, Mme Bélanger, qui a agi comme procureur.

Au cours de l'enquête, l'appelante a donné le témoignage suivant en réponse à des questions de M. Malouin, l'enquêteur spécial: (page 6 du procès-verbal de l'enquête)

"Q. A cet examen hier, avez-vous demandé l'admission permanente ou temporaire?

R. J'ai demandé de venir au Canada pour trois ans.

Q. Pour quelle raison avez-vous demandé de demeurer au Canada pour trois ans?

R. Pour travailler.

Q. Aujourd'hui à cette enquête, demandez-vous l'admission permanente ou temporaire?

Q.- Mademoiselle Mayoute, saviez-vous que pour travailler au Canada il fallait y venir comme immigrante?

R.- Non, monsieur.

Q.- Quel était votre but principal en venant ici?

R.- Pour gagner ma vie et voir comment ça se passe ici.

Q.- Diriez-vous que vous venez au Canada comme visiteur ou comme immigrante?

R.- J'avais l'impression de venir comme immigrante.

Q.- Mademoiselle Mayoute, je dois donc comprendre à la suite de votre déclaration que vous venez ici en permanence. En conséquence, je dois vous examiner au point de vue Immigration comme immigrante. Comprenez-vous bien cela?

R.- Oui, monsieur."

It may be noted that all Mlle Mayoute's answers, except the last two, are consistent with an intention to enter Canada as a non-immigrant. She stated categorically that she had asked to come to Canada for three years, and there was at no time any evidence before the Special Inquiry Officer that she intended to be, or was in fact an applicant for landed immigrant status in Canada. It is true that in reply to the question "Diriez-vous que vous venez au Canada comme visiteur ou comme immigrante?" she said "J'avais l'impression de venir comme immigrante.", but this answer is entirely comprehensible in view of Mr. Malouin's prior question "Mademoiselle Mayoute, saviez-vous que pour travailler au Canada il fallait y venir comme immigrante?" In asking this question, Mr. Malouin, no doubt innocently, misled the appellant, and, as may be deduced from his decision, himself.

Section 7(1)(h) of the Immigration Act reads as follows:

Section 7(1) "The following persons may be allowed to enter and remain in Canada as non immigrants, namely,

- (h) persons engaged in a legitimate profession, trade or occupation entering Canada or who, having entered, are in Canada for the temporary exercise of their respective calling;"

On the evidence adduced at the inquiry, the case of Mlle Mayoute falls squarely within this section, and the Special Inquiry Officer should have entered her as a non-immigrant for the period requested, namely three years.

R. Je ne sais pas, je suis venue ici de bonne foi pour travailler, peut-être que je demeurerai en permanence si je me plais ici.

Q. Mademoiselle Mayoute, saviez-vous que pour travailler au Canada, il fallait y venir comme immigrante?

R. Non, monsieur.

Q. Quel était votre but principal en venant ici?

R. Pour gagner ma vie et voir comment ça se passe ici.

Q. Diriez-vous que vous venez au Canada comme visiteur ou comme immigrante?

R. J'avais l'impression de venir comme immigrante.

Q. Mademoiselle Mayoute, je dois donc comprendre à la suite de votre déclaration que vous venez ici en permanence. En conséquence, je dois vous examiner au point de vue Immigration comme immigrante.

Comprenez-vous bien cela?

R. Oui, monsieur."

On peut souligner que toutes les réponses de Mlle Mayoute, à l'exception des deux dernières, sont consistantes et révèlent son intention d'entrer au Canada comme non-immigrante. Elle a déclaré catégoriquement qu'elle avait demandé de venir au Canada pour trois ans et il n'a jamais été mis en preuve devant l'enquêteur spécial qu'elle demandait le statut d'immigrante reçu au Canada ou qu'elle avait l'intention de ce faire. Il est vrai qu'à la question: "Diriez-vous que vous venez au Canada comme visiteur ou comme immigrante?", elle a répondu: "J'avais l'impression de venir comme immigrante", mais cette réponse se comprend facilement étant donné que la question précédente de M. Malouin était: "Mademoiselle Mayoute, savez-vous que pour travailler au Canada il fallait y venir comme immigrante?" En posant cette question, M. Malouin trompait, sans s'en rendre compte sans doute, l'appelante et, si on en juge d'après sa décision, il se trompait lui-même.

L'article 7(1)(h) de la Loi sur l'immigration est le suivant:

Article 7(1) "il peut être permis aux personnes suivantes d'entrer et de demeurer au Canada, à titre de non-immigrants, savoir:

- (h) les personnes pratiquant une profession, un commerce ou une occupation légitime qui entrent au Canada ou qui, étant entrés, sont dans ce pays pour l'exercice temporaire de leur état respectif."

As a non-immigrant, Mlle Mayoute, a French citizen, does not require a visa or letter of pre-examination. Section 28(3) of the Immigration Regulations, Part 1, reads as follows:

"28.(3) Every non-immigrant who seeks to enter Canada shall be in possession of a valid and subsisting non-immigrant visa issued to him by a visa officer and bearing a serial number which has been recorded by such officer in a register prescribed by the Minister for that purpose, and unless he is in possession of such visa, he shall not be granted entry to Canada."

The Minister has, however, pursuant to the powers given to him by Section 28(4) of the Immigration Regulations, Part 1, exempted "citizens of France" and "persons born in any country of North, South or Central America or stands adjacent thereto coming to Canada directly from such country or island" from the requirements of Section 28(3).

Further, a non-immigrant does not require a medical certificate, pursuant to Section 29(1) of the Immigration Regulations, Part 1, since that section applies only to immigrants.

The order of deportation made against Mlle Mayoute on October 20, 1968, is therefore null and void.

Pursuant to Section 14 of the Immigration Appeal Board Act, the Board may "dispose of an appeal under Section 11...by...(c) rendering the decision and making the order that the Special Inquiry Officer who presided at the hearing should have rendered and made." The Board, therefore, has rendered the decision that Mlle Mayoute be admitted to Canada for a period of three years from January 15, 1969, with the status of non-immigrant under Section 7(1)(h) of the Immigration Act.

Concurred in by : Jean-Paul Geoffroy and Gérard Legaré.

For the appellant: Mme Lorraine Gagnon-Bélanger;
for the respondent: Jacques Pépin, Esq.

D'après la preuve administrée à l'enquête, cet article s'applique très exactement au cas de Mlle Mayoute et l'enquêteur spécial aurait dû lui permettre d'entrer comme non-immigrante pour la période demandée, soit trois ans.

Comme non-immigrante, Mlle Mayoute, qui est citoyenne française, n'a pas besoin d'un visa ou d'une lettre de pré-examen. L'article 28(3) du Règlement sur l'immigration est le suivant:

"28(3) Tout non-immigrant qui cherche à entrer au Canada devra être en possession d'un visa de non-immigrant valable et non périmé qui lui aura été inscrit par ledit préposé dans un registre prescrit par le Ministre à cette fin, et, à moins qu'il ne soit en possession d'un tel visa, il n'obtiendra pas l'entrée au Canada."

Cependant, le Ministre, en vertu des pouvoirs qui lui sont conférés par l'article 28(4) de la partie I du Règlement sur l'immigration, a exempté des dispositions de l'article 28(3): "les citoyens de France" et "les personnes nées ou naturalisées dans tout pays d'Amérique du Nord, du Sud ou d'Amérique centrale ou des Iles de ces continents qui entrent au Canada en provenance directe de ces pays ou de ces Iles."

De plus, un non-immigrant n'a pas besoin du certificat médical prévu à l'article 29(1) de la Partie I du Règlement sur l'immigration puisque cet article ne s'applique qu'aux immigrants.

L'ordonnance d'expulsion rendue contre Mlle Mayoute le 20 octobre 1968 est donc nulle et non avenue.

En vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission peut "statuer sur un appel prévu à l'article 11...(c) en prononçant la décision et en rendant l'ordonnance que l'enquêteur spécial qui a présidé l'audition avait dû prononcer et rendre." La Commission a donc rendu la décision que Mlle Mayoute soit admise au Canada pour une période de trois ans à compter du 15 janvier 1969 et qu'il lui soit accordé le statut de non-immigrante en vertu de l'article 7(1)(h) de la Loi sur l'immigration.

Ont souscrit: Jean-Paul Geoffroy et Gérard Legaré.

Pour l'appelante: Mme Lorraine Gagnon-Bélanger;
pour l'intimé: M. Jacques Pépin.

16.

John MOSHOS et al,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 11, 1969;

File: 69-14

Coram: J.C.A. Campbell, Vice-Chairman, U. Benedetti, J.A. Byrne.

Presence of the person concerned, whenever practicable, at the inquiry.
 Proof of Dependency - Change of status by making application for permanent residence. - Immigration Act: 27(1), 37(1).

Held: There is nothing in the Immigration Act which says a witness must be present throughout the entirety of Inquiry. However if a person who is called as a witness is likely to become subject to deportation as a dependant then all the applicable rules and regulations relating to the holding of an Inquiry must be observed in order to protect the fundamental rights of such a person. - The Board finds that the Special Inquiry Officer complied with the requirements of the Immigration Act and its regulations in that Mrs. Moshos was informed of the probable results of the Inquiry in so far as she and the children were concerned, that she was not denied counsel and that she received a fair hearing.- At the time of the Inquiry she was not employed and she has not been given permission to work. It follows that at the time of the Inquiry she was a dependent and she admitted this fact. Her expressed intention to work at some time in the future, if permitted to remain in Canada, does not take her out of the category of "dependent". Provision in the Immigration Act for the inclusion of dependents in a deportation order made against the head of the family is quite separate and distinct from any application made by a non-immigrant for permanent residence. If argument to the contrary were to prevail it would mean that any non-immigrant by making a speedy application for permanent residence could nullify the related provisions of the Act. This cannot be the intent of the Act.-

The judgment of the Board was delivered by:

J.C.A. Campbell:

These are the appeals of John Moshos, his wife, Smaroula Moshos and their two minor children, Sultana and Panagiotis Moshos who were ordered deported on 6 December 1968, by Special Inquiry Officer C.L.Somers at Toronto, Ontario, in the following terms:

16.

John MOSHOS et al,

appelants,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 11 mars 1969;

Dossier: 69-14.

Coram: J.C.A. Campbell, vice-président, U. Benedetti, J.A. Byrne.

Présence du sujet à l'enquête lorsque pratiquement possible - Preuve de la dépendance. - Changement de statut par suite d'une demande de résidence permanente. - Loi sur l'immigration: 27(1), 37(1).

Arrêt: Il n'y a rien dans la Loi sur l'immigration qui dit qu'un témoin doit être présent durant toute la durée d'une enquête. Cependant si une personne citée comme témoin peut devenir sujette à expulsion - comme personne à charge - alors on doit appliquer toutes les règles pertinentes à la tenue d'une enquête afin de protéger les droits fondamentaux de cette personne. La Commission estime que l'enquêteur s'est conformé aux prescriptions et au règlement de la Loi sur l'immigration: Mme Moshos fut informée des conclusions probables de l'enquête, quant à elle et à ses enfants; on ne lui a pas nié le droit à un procureur et elle a reçu audition équitable. Au moment de l'enquête elle n'avait pas d'emploi et elle n'avait pas obtenu l'autorisation de travailler. Il s'en suit qu'à l'époque de l'enquête elle était "un dépendant" et elle a admis le fait. Son intention avouée de travailler, plus tard, si elle était autorisée à demeurer au Canada, ne l'exclut pas de la catégorie des "dépendants". Il faut maintenir une distinction claire et précise entre une demande de résidence permanente soumise par un non-immigrant, et les prescriptions de la Loi de l'immigration qui pourvoient à l'inclusion des dépendants dans une ordonnance d'expulsion rendue contre le chef de famille. - En tenir pour l'opinion contraire signifierait qu'un non-immigrant pourrait par une demande hâtive de résidence permanente, rendre de nul effet les prescriptions pertinentes de la Loi. L'intention de la Loi ne peut être telle.-

Le jugement de la Commission fut rendu par:

J.C.A. Campbell, vice-président:

Appel d'une ordonnance d'expulsion rendue le 6 décembre 1968, à Toronto, Ontario par M. C.L. Somers, enquêteur spécial contre les appelants: M. John Moshos, son épouse, Smaroula Moshos et leur deux enfants mineurs Sultana et Panagiotis Moshos. L'ordonnance d'expulsion dit:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile, and that:
- (3) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act as you cannot or do not fulfil or comply with the conditions or requirements of the Immigration Act or the Regulations in that:
 - (a) you are not in possession of a letter of pre-examination in the form prescribed by the Minister in accordance with the requirements of subsection (2) of section 28 of the Immigration Regulations, Part 1, and you are not eligible for admission to Canada for permanent residence without said letter of pre-examination since you have taken employment in Canada without the written approval of an officer of the Department contrary to the conditions of paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part 1; amended;
 - (b) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part 1.

This order includes your dependent wife and children, Smaro (Smaroula), Sultana and Panagiotis Moshos under the provisions of subsection (1) of section 37 of the Immigration Act."

Mr. and Mrs. Moshos were both present at the hearing of their appeals. Mr. Moshos was represented by C. Amourgis, Barrister. Mr. N.A. Endicott, Barrister, represented Mrs. Moshos and the two minor children.

At the commencement of the hearing before the Board it was agreed that the appeal of Mrs. Moshos (including the two children) would be heard prior to that of Mr. Moshos.

There was no dispute that all the appellants are not Canadian citizens or that they have not acquired Canadian domicile within the meaning of the Immigration Act. Furthermore it was not disputed that the two minor children are dependants.

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile, and that:
- (3) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act as you cannot or do not fulfil or comply with the conditions or requirements of the Immigration Act or the Regulations in that:
 - (a) you are not in possession of a letter of pre-examination in the form prescribed by the Minister in accordance with the requirements of subsection (2) of section 28 of the Immigration Regulations, Part 1, and you are not eligible for admission to Canada for permanent residence without said letter of pre-examination since you have taken employment in Canada without the written approval of an officer of the Department contrary to the conditions of paragraph (e) of subsection (3) of section 34 of the Immigration Regulations, Part 1, amended;
 - (b) your passport does not bear a medical certificate duly signed by a medical officer nor are you in possession of a medical certificate in the form prescribed by the Minister as required by subsection (1) of section 29 of the Immigration Regulations, Part 1.

This order includes your dependent wife and children Smaro (Smaroula), Sultana and Panagiotis Moshos under the provisions of subsection (1) of section 37 of the Immigration Act."

M. et Mme Moshos étaient présents à l'audition de leur appel. M. C. Amourgis, avocat, représentait M. Moshos. M. N.A. Endicott, avocat, représentait Mme Moshos et ses deux enfants mineurs.

Au début de l'audition devant la Commission on a décidé que l'appel de Mme Moshos et des deux enfants serait entendu avant celui de M. Moshos.

Les appelants ont admis ne pas être canadiens, ne pas avoir acquis le domicile canadien selon le sens de la Loi sur l'immigration, et que les enfants sont à charge.

The relevant facts relating to all the appellants are as follows:

Mr. Moshos was born in Greece on 1 December 1936. He is now a naturalized citizen of Australia. He has three sisters none of whom reside in Canada. He commenced school at the age of seven, leaving at age fifteen. After leaving school he learned the trade of blacksmith from his father for a period of three years. At age eighteen he migrated to Australia and became a naturalized citizen of that country. He had various employment in that country, his last two jobs (according to the information given on his application for permanent residence in Canada) being with National Forges Company as a press operator from 1951 to 1959 and with General Paper Mills from 1959 to 1967 as a transport driver and paper maker. In Australia, in 1959, he married his present wife. They have two children both born in Australia. Early in 1966 he returned to Greece. His wife and two children had preceded him to Greece as her mother was not well. While in Greece on 5 July 1967 he completed an application for permanent admission to Canada. He claims he did not receive the letter of refusal (Exhibit A-4, Appeal hearing) nor did he know this application had been refused.

Mr. Moshos entered Canada on 22 November 1967 as a non-immigrant (7(1)(c)) for a period to expire 21 April 1968. On 2 January 1968 he applied for permanent admission to Canada. His application form shows that his wife and two children are to follow him to this country. His passport was endorsed on 2 January 1968 "not permitted to take employment in Canada".

Mrs. Moshos, who was born in Greece, is also a naturalized Australian citizen. Her trade is that of a carpet weaver. She worked at this trade for five or six years in Australia as a weaver and mender engaged in finishing carpets except for the times she was unable to work because of her pregnancies. At the Inquiry she stated her salary, in Australia, was \$70.00 a week. It is her intention to obtain work in Canada, if she should be permitted to remain.

Mrs. Moshos, accompanied by her two minor children Sultana and Panagiotis, entered Canada on 9 March 1968 as non-immigrants pursuant to Section 7(1)(c) of the Immigration Act (visitors or tourists) for a period to expire on 9 April 1968. On 19 March 1968 she applied for permanent residence in Canada and was given an appointment for 19 April 1968 on which date she would be interviewed by the Immigration authorities regarding her application. On 19 April 1968 her passport was endorsed NIAL (non-immigrant applicant for landing).

Mr. Endicott, counsel for Mrs. Moshos and the two minor children, challenged the validity of the deportation order on the following grounds:

Les faits pertinents relatifs à tous les appelants sont les suivants:

M. Moshos est né en Grèce le 1^{er} décembre 1936. A présent il est citoyen australien par naturalisation. Il a trois soeurs mais aucune ne demeure au Canada. Il a commencé l'école à sept ans et l'a quittée à quinze ans. Après avoir quitté l'école pendant trois années il a appris le métier de forgeron sous les directives de son père. A l'âge de dix huit ans il a émigré en Australie et est devenu, par naturalisation, citoyen de ce pays. Selon les renseignements fournis par la demande de résidence permanente au Canada, en Australie il a occupé différents emplois; voici ces deux derniers emplois: 1^{er}) de 1951 à 1959 ouvrier sur presse à National Forges Company; 2) de 1956 à 1967 à General Paper Mills, conducteur de camions et ouvrier papetier. En Australie, en 1959 les appelants se sont mariés. Ils ont eu deux enfants qui sont nés en Australie. Au début de l'année 1966 sa mère étant malade il est retourné en Grèce accompagné de son épouse et des enfants. Le 5 juillet 1967 durant son séjour en Grèce il a rempli une formule de demande d'admission permanente au Canada. Il prétend n'avoir ni reçu la lettre de refus (pièce à l'appui A-4, audition de l'appel) ni savoir qu'on avait refusé cette demande.

Le 22 novembre 1967 M. Moshos est entré au Canada à titre de touriste (7(1)(c)), son permis de séjour s'achevait le 21 avril 1968. Le 2 janvier 1968 il a présenté une demande d'admission permanente au Canada. La formule montre que son épouse et les deux enfants devaient le rejoindre au Canada. Le 2 janvier 1968 on a apposé sur son passeport la mention "not permitted to take employment in Canada."

Mme Moshos, née en Grèce, est aussi australienne par naturalisation. En Australie elle a travaillé cinq ou six années (sauf pendant les périodes de grossesses où elle n'était pas capable de travailler) en tant que tisseuse de tapis et raccommodeuse employée à la finition des tapis. A l'enquête elle a déclaré qu'en Australie elle touchait un salaire hebdomadaire de soixante dix dollars. Elle a l'intention de travailler au Canada, si on lui permet d'y demeurer.

Le 19 mars 1968, Mme Moshos et ses deux enfants, entraient au Canada à titre de non-immigrant (visiteurs ou touristes) aux termes de l'article 7(1)(c) de la Loi sur l'immigration; leur permis de séjour expirait le 9 avril 1968. Le 19 mars 1968 elle a présenté une demande de résidence permanente; elle recevait une convocation pour le 19 avril 1968 date à laquelle elle aurait une entrevue avec les autorités de l'immigration au sujet de sa demande. Le 19 avril 1968 on a apposé sur son passeport la mention N.I.A.L. (non-immigrant applicant for landing).

- (a) That Mrs. Moshos had not been present throughout the whole inquiry which was contrary to Section 27(1) of the Immigration Act and therefore she did not have a proper hearing. In support of this portion of his argument Mr. Endicott referred the Board to its decision in the appeal of Ioranides, Immigration Appeal Board file 67-5055, which he stated to be similar to the instant case insofar as it applied to Mrs. Moshos. Section 27(1) is as follows:

"27(1) An inquiry by a Special Inquiry Officer shall be separate and apart from the public but in the presence of the person concerned wherever practicable."

- (b) That Section 37(1) of the Immigration Act is probably void as being contrary to the Canadian Bill of Rights.
- (c) That the evidence does not support a finding by the Special Inquiry Officer that Mrs. Moshos is a dependant.
- (d) That as Mrs. Moshos was an applicant for landing her status had changed from that of a visitor and as such her application should be dealt with in the normal way.

Dealing seriatim with Mr. Endicott's arguments:

- (a) The Special Inquiry Officer called Mrs. Moshos as a witness at her husband's inquiry. There is nothing in the Immigration Act which says a witness must be present throughout the entirety of an Inquiry. Section 27(1) refers to the "person concerned" being present and even this is qualified in that section by the use of the words "wherever practicable". Section 37(1) does not mention either an Inquiry or a Special Inquiry Officer. However if a person who is called as a witness is likely to become subject to deportation as a dependent then all the applicable rules and regulations relating to the holding of an Inquiry must be observed in order to protect the fundamental rights of such a person. Were these rules and regulations observed in this case? Mrs. Moshos having been called as a witness and after being sworn was advised by the Special Inquiry Officer as follows: (Inquiry, page 18)

"Q. Are you the wife of John Moshos concerning whom this Inquiry is being held?

A. Yes.

M. Endicott, conseiller de Mme Moshos et des deux enfants mineurs, a contesté la validité de l'ordonnance d'expulsion. Ses motifs sont les suivants:

- a) A l'encontre de l'article 27(1) de la Loi sur l'immigration, Mme Moshos n'était présente pendant l'enquête, en conséquence elle n'a pu obtenir une audition régulière. Au support de son argument M. Endicott a renvoyé la Commission à sa décision dans l'affaire Ioranides (Commission d'appel de l'immigration dossier no. 67-5055); il a déclaré que l'affaire Ioranide présente des similitudes avec le cas de Mme Moshos. L'article 27(1) dit:

"27(1) Une enquête tenue par un enquêteur spécial doit avoir lieu privément, mais en présence de l'intéressé chaque fois que la chose est pratiquement possible."

- b) L'article 37(1) de la Loi sur l'immigration est probablement nul puisque contraire à la Déclaration des droits.
- c) La preuve ne vient pas au support de la conclusion de l'enquêteur spécial à l'effet que Mme Moshos est une personne à charge.
- d) De visiteur qu'il était, le statut de Mme Moshos a changé puisqu'elle a demandé le droit d'entrée et ainsi sa demande devrait être étudiée selon la procédure coutumière.

Nous traiterons successivement des arguments de M. Endicott:

- a) A l'enquête relative à M. Moshos, l'enquêteur spécial a convoqué Mme Moshos comme témoin. Il n'y a rien dans la Loi sur l'immigration qui dit qu'un témoin doit être présent durant toute la durée de l'enquête.

L'article 27 mentionne que "la personne intéressée" doit être présente, mais comme le précise l'article "chaque fois que la chose est pratiquement possible". L'article 37(1) ne mentionne ni une enquête, ni un enquêteur spécial. Cependant si une personne citée comme témoin peut devenir sujette à expulsion - comme personne à charge - alors on doit appliquer

Q. Mrs. Moshos, subsection (1) of section 37 of the Immigration Act reads as follows:

"Where a deportation order is made against the head of the family, all dependent members of the family may be included in such order and deported under it."

By Counsel:

At this particular point I would like to make a submission to you sir that it not be interpreted by you or anyone else that I am appearing on behalf of this witness and I have come here only for the purpose of defending the rights of Mr. John Moshos so as an amicus curiae I would like to make the following submission that this particular lady might want to retain a lawyer to protect her rights in the event some of the facts used in this inquiry be used at a much later date against her. On her behalf I take the liberty of asking the protection of the Canada Evidence Act for all answers she might give in this inquiry that will tend to incriminate her or be used against her at any later proceedings. If this witness is brought on behalf of the Immigration Department, I, as counsel, to John Moshos reserve my right to cross-examine her on the evidence she might give pertaining to my client's inquiry. Thank you.

By Special Inquiry Officer to Witness:

In view of this section of the Regulations, in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and the children in such deportation order.

Q. Do you understand that?

A. Yes, of course.

Q. As your husband's counsel has pointed out, he is not prepared to act for you and you do have the rights to be represented by counsel yourself. Do you wish to secure counsel?

A. Yes, Mr. Amourgis.

toutes les règles pertinentes à la tenue d'une enquête afin de protéger les droits fondamentaux de cette personne. Est-ce que dans cette affaire ces règles ont été observées? L'enquêteur spécial a cité Mme Moshos comme témoin; après qu'elle a juré il l'a informée de ceci (p. 18 de l'enquête):

"Q. Are you the wife of John Moshos concerning whom this Inquiry is being held?

A. Yes.

Q. Mrs. Moshos, subsection (1) of section 37 of the Immigration Act reads as follows:

"Where a deportation order is made against the head of the family, all dependent members of the family may be included in such order and deported under it."

Le conseiller:

At this particular point I would like to make a submission to you sir that it not be interpreted by you or anyone else that I am appearing on behalf of this witness and I have come here only for the purpose of defending the rights of Mr. John Moshos so as an amicus curiae I would like to make the following submission that this particular lady might want to retain a lawyer to protect her rights in the event some of the facts used in this inquiry be used at a much later date against her. On her behalf I take the liberty of asking the protection of the Canada Evidence Act for all answers she might give in this inquiry that will tend to incriminate her or be used against her at any later proceedings. If this witness is brought on behalf of the Immigration Department, I, as counsel, to John Moshos reserve my right to cross-examine her on the evidence she might give pertaining to my client's inquiry. Thank you.

L'enquêteur spécial au témoin:

In view of this section of the Regulations, in the event a deportation order is issued against your husband it may be necessary on the basis of the evidence that we wish you to give now to include you and the children in such deportation order.

Q. Mr. Amourgis is not prepared to accept you as a client at this time?

A. Why, I have to get a lawyer.

Q. Do you wish to secure other counsel before giving evidence?

A. No, I do not want a lawyer.

Q. In the event Mr. Amourgis is not prepared to act as counsel, do you wish to proceed with the giving of evidence without counsel?

A. Yes."

In the Board's opinion the reading to Mrs. Moshos of Section 37(1) by the Special Inquiry Officer together with the explanation he gave her was sufficient notice of the purpose of her being called to give evidence and what might happen as a result of her giving evidence. She was given the opportunity to request counsel and elected to proceed without counsel being present. There is the further fact that Mr. Amourgis spoke to the Special Inquiry Officer, in her presence, and suggested that she might wish to have a lawyer represent her but despite this intervention she saw fit to proceed without counsel.

The case of Ioannis Ioranides, Immigration Appeal Board 67-5055, (not reported) is of no assistance in the instant appeal. Mrs. Ioranides a "landed immigrant" was included under the provisions of Section 37(1) of the Immigration Act in a deportation order made against her husband. Mr. Jean-Paul Geoffroy who wrote the judgment of the Board in that case said inter alia:

" Il en va différemment dans le cas de son épouse. Celle-ci a été appelée comme témoin au cours de l'enquête concernant son mari. L'Officier spécial d'enquête lui a posé plusieurs questions relatives à son identité, son statut au Canada et son mariage. Il lui demanda également si elle avait déjà travaillé au Canada et si elle avait des épargnes. Il s'assura aussi qu'elle était au courant de la raison pour laquelle son mari était cité à l'enquête.

Il est à noter que l'Enquêteur spécial n'a pas informé Madame Ioranides de son droit de retenir les services d'un avocat ou autre conseiller. Il n'a pas, non plus, informé Madame Ioranides du but de l'audition et qu'elle pourrait, par la suite, être expulsée du Canada.

Q. Do you understand that?

A. Yes, of course.

Q. As your husband's counsel has pointed out, he is not prepared to act for you and you do have the rights to be represented by counsel yourself. Do you wish to secure counsel?

A. Yes, Mr. Amourgis.

Q. Mr. Amourgis is not prepared to accept you as a client at this time?

A. Why, I have to get a lawyer.

Q. Do you wish to secure other counsel before giving evidence?

A. No, I do not want a lawyer.

Q. In the event Mr. Amourgis is not prepared to act as counsel, do you wish to proceed with the giving of evidence without counsel?

A. Yes."

La Commission estime que la lecture (accompagnée d'explication) de l'article 37(1) donnée par l'enquêteur spécial à Mme Moshos constitue un avis qui exprime le but de la convocation, à savoir fournir un témoignage et les éventuelles conséquences de ce témoignage. Elle a eu l'occasion de retenir les services d'un conseiller juridique et a décidé de poursuivre sans la présence d'un conseiller. La Commission mentionne le fait supplémentaire suivant: en présence de Mme Moshos, M. Amourgis a discuté avec l'enquêteur spécial et a souligné que l'appelante pourrait désirer un avocat pour le représenter; en dépit de cette intervention elle a jugé bon de poursuivre sans conseiller.

La décision dans l'affaire Ioannis Ioranides, Commission d'appel de l'immigration dossier no. 67-5055 (non-rapporté) en aucune manière ne regarde ce cas. Mme Ioranides, "une immigrante reçue" a été comprise dans l'ordonnance d'expulsion rendue contre son époux. M. J. Paul Geoffroy dans les motifs pour le jugement a déclaré:

" Il en va différemment dans le cas de son épouse. Celle-ci a été appelée comme témoin au cours de l'enquête concernant son mari. L'officier spécial d'enquête lui a posé plusieurs questions relatives à son identité, son statut au Canada et son mariage. Il lui demanda également si elle avait déjà travaillé au Canada et si elle avait des épargnes. Il s'assura aussi qu'elle était au courant de la raison pour laquelle son mari était cité à l'enquête.

L'article 37(1) de la Loi sur l'immigration permet d'inclure dans une Ordonnance d'expulsion rendue contre le chef d'une famille tous les membres à charge du chef de famille. Il faut établir que ces membres sont à la charge du chef de famille. La dépendance, n'étant pas autrement qualifiée, doit en être une qui revêt une certaine permanence. Elle ne peut pas n'être qu'accidentelle. L'Article 37(1) ne parle pas d'enquête, ni d'officier spécial d'Immigration. On doit comprendre, à la lecture de l'ensemble de la Loi sur l'immigration que cette inclusion relève de la juridiction de l'Enquêteur spécial et, semble-t-il, il ne peut l'exercer qu'à la suite d'une enquête qu'il doit tenir dans les cas prévus par la Loi sur l'immigration. L'émission d'une Ordonnance d'expulsion est donc nécessairement précédée d'une enquête par un Enquêteur spécial. A notre avis, l'inclusion d'une personne à charge dans l'Ordonnance d'expulsion émise contre le chef de famille équivaut à toutes fins à l'émission d'une Ordonnance d'expulsion. Elle doit être précédée d'une enquête et les règles prévues dans les Règlements sur les enquêtes de l'immigration doivent être scrupuleusement observées, en particulier celles qui tendent à protéger les droits fondamentaux d'une personne.

Dans le cas de Madame Ioranides l'Enquêteur spécial, bien que les règlements lui en fassent obligation, ne l'a pas informée de son droit de retenir les services d'un avocat ou d'un conseiller, (Article 3 des Règlements de la Loi sur l'immigration). Ce qui est encore plus grave, l'Enquêteur spécial, bien que tenu de le faire, (Article 8 du Règlement de la Loi sur l'Immigration), n'a pas informé Madame Ioranides que le but qu'il poursuivait au cours de l'audition était de déterminer si elle était une personne qui pouvait demeurer au Canada. Le procès-verbal de l'enquête nous révèle qu'elle fut entendue comme témoin dans une affaire qui, à première vue, ne concernait que son mari soupçonné d'être entré et d'être demeuré au Canada illégalement. La Commission considère que Madame Ioranides n'ayant pas été informée de l'objet de l'enquête, ni non plus de son droit à être assistée d'un conseiller, a été privée des moyens que la Loi et la justice naturelle considèrent essentiels à la tenue d'une enquête dont l'issue est une décision de nature quasi judiciaire.

Il est à noter que l'Enquêteur spécial n'a pas informé Madame Ioranides de son droit de retenir les services d'un avocat ou autre conseiller. Il n'a pas, non plus, informé Madame Ioranides du but de l'audition et qu'elle pourrait, par la suite, être expulsée du Canada.

L'Article 37(1) de la Loi sur l'immigration permet d'inclure dans une Ordonnance d'expulsion rendue contre le chef d'une famille tous les membres à charge du chef de famille. Il faut établir que ces membres sont à la charge du chef de famille. La dépendance, n'étant pas autrement qualifiée, doit en être une qui revêt une certaine permanence. Elle ne peut pas n'être qu'accidentelle. L'Article 37(1) ne parle pas d'enquête, ni d'officier spécial d'Immigration. On doit comprendre, à la lecture de l'ensemble de la Loi sur l'immigration que cette inclusion relève de la juridiction de l'Enquêteur spécial et, semble-t-il, il ne peut l'exercer qu'à la suite d'une enquête qu'il doit tenir dans les cas prévus par la Loi sur l'immigration. L'émission d'une ordonnance d'expulsion est donc nécessairement précédée d'une enquête par un Enquêteur spécial. A notre avis, l'inclusion d'une personne à charge dans l'ordonnance d'expulsion émise contre le chef de famille équivaut à toutes fins à l'émission d'une ordonnance d'expulsion. Elle doit être précédée d'une enquête et les règles prévues dans les Règlements sur les enquêtes de l'immigration doivent être scrupuleusement observées, en particulier celles qui tendent à protéger les droits fondamentaux d'une personne.

Dans le cas de Madame Ioranides, l'Enquêteur spécial, bien que les règlements lui en fassent obligation, ne l'a pas informée de son droit de retenir les services d'un avocat ou d'un conseiller, (Article 3 des Règlements de la Loi sur l'immigration). Ce qui est encore plus grave, l'Enquêteur spécial, bien que tenu de le faire, (Article 8 du Règlement de la Loi sur l'Immigration), n'a pas informé

L'Enquêteur spécial devait, pour justifier l'inclusion de Madame Ioranides dans l'Ordonnance d'expulsion de son mari, établir qu'elle était à la charge de ce dernier. L'Article 37(1) ne réfère pas aux obligations qu'impose le droit commun au mari ou à la femme. Les termes utilisés, "à charge de" (texte anglais "dependent"), ont une connotation exclusivement économique. "A charge de" veut dire que la personne visée ne peut par elle-même subvenir à ses besoins et, qu'en l'absence du chef de famille, elle deviendrait à charge du public, ce qui en vertu de l'Article 19(1)(e)(5) de la Loi sur l'immigration, la classerait dans une des catégories interdites, soit celle visée par l'Article 5(h). Cette dépendance doit s'étendre sur une certaine durée. Un immigrant qui, à la suite d'un accident de travail, souffrirait d'une incapacité temporaire, ne serait pas de ce fait sujet à être expulsé. Il en va de même dans les cas de maladie, de chômage, etc. Dans le cas d'une femme, la dépendance pour être valable doit supposer l'incapacité à occuper une fonction rémunératrice. La grossesse est de nature temporaire et lorsqu'une femme a, avant de devenir enceinte, exercé un métier ou rempli une occupation lui permettant de subvenir à ses besoins, elle peut être présumée habile à réintégrer son emploi une fois la délivrance accomplie et à pouvoir subvenir à ses besoins. Madame Ioranides, avant sa grossesse, avait occupé un emploi rémunérateur. Rien dans la preuve ne nous indique qu'elle ne pourra pas y retourner. La Commission considère qu'aux termes de l'Article 37(1), elle ne peut être considérée une personne à charge.

La Commission décide donc d'accepter l'appel de Madame Ioranides."

In the instant appeal the Special Inquiry Officer having read Section 37(1) of the Immigration Act informed Mrs. Moshos that she and the children might be included in the event a deportation order should be issued against her husband and he informed her of her right to counsel.

The Board finds that the Special Inquiry Officer complied with the requirements of the Immigration Act and its regulations in that she was informed of the probable results of the Inquiry insofar as she and the children were concerned, that she was not denied counsel and that she received a fair hearing.

Madame Ioranides que le but qu'il poursuivait au cours de l'audition était de déterminer si elle était une personne qui pouvait demeurer au Canada. Le procès-verbal de l'enquête nous révèle qu'elle fut entendue comme témoin dans une affaire qui, à première vue, ne concernait que son mari soupçonné d'être entré et d'être demeuré au Canada illégalement. La Commission considère que Madame Ioranides n'ayant pas été informée de l'objet de l'enquête, ni non plus de son droit à être assistée d'un conseiller, a été privée des moyens que la Loi et la justice naturelle considèrent essentiels à la tenue d'une enquête dont l'issue est une décision de nature quasi judiciaire.

L'Enquêteur spécial devait, pour justifier l'inclusion de Madame Ioranides dans l'Ordonnance d'expulsion de son mari, établir qu'elle était à la charge de ce dernier. L'Article 37(1) ne réfère pas aux obligations qu'impose le droit commun au mari ou à la femme. Les termes utilisés, "à charge de" (texte anglais "dependent") ont une connotation exclusivement économique. "A charge de" veut dire que la personne visée ne peut par elle-même subvenir à ses besoins et, qu'en l'absence du chef de famille, elle deviendrait à charge du public, ce qui en vertu de l'Article 19(1)(e)(5) de la Loi sur l'immigration, la classerait dans une des catégories interdites, soit celle visée par l'Article 5(h). Cette dépendance doit s'étendre sur une certaine durée. Un immigrant qui, à la suite d'un accident de travail, souffrirait d'une incapacité temporaire, ne serait pas de ce fait sujet à être expulsé. Il en va de même dans les cas de maladie, de chômage, etc. Dans le cas d'une femme, la dépendance pour être valable doit supposer l'incapacité à occuper une fonction rémunératrice. La grossesse est de nature temporaire et lorsqu'une femme a, avant de devenir enceinte, exercé un métier ou repli une occupation lui permettant de subvenir à ses besoins, elle peut être présumée habile à réintégrer son emploi une fois la délivrance accomplie et à pouvoir subvenir à ses besoins. Madame Ioranides, avant sa grossesse, avait occupé un emploi rémunérateur. Rien dans la preuve ne nous indique qu'elle ne pourra pas y retourner. La Commission considère qu'aux termes de l'Article

- (b) Mr. Endicott did not refer the Board to any Section or Sections of the Canadian Bill of Rights (1960) R.S.C. Chapter 44, in support of his generalization that Section 37(1) was probably void as being contrary to the Bill of Rights. As there was no argument or submission made in support of this generalization the Board considers it unnecessary to deal with this point.
- (c) The evidence at the Inquiry showed that Mrs. Moshos had been gainfully employed in Australia as a carpet weaver. While she testified at the Inquiry that she intended to work either at her trade or at some other employment if she should be permitted to remain in Canada the fact remains she was not employed at the time of the Inquiry and that she had not been given permission to work (Inquiry, page 20). It follows that at the time of the Inquiry she was a dependant and she admitted this fact (Inquiry, page 20). Her expressed intention to work at some time in the future, if permitted to remain in Canada, does not take her out of the category of "dependent".
- (d) Mrs. Moshos applied for permanent residence on 19 March 1968, ten days after her arrival in Canada. Parliament in Section 37 of the Immigration Act has seen fit to provide for the inclusion of dependents in a deportation order made against the head of a family. Such provision (i.e.) Section 37 is quite separate and distinct from any application made by a non-immigrant for permanent residence. If Mr. Endicott's argument were to prevail it would mean that any non-immigrant by making a speedy application for permanent residence could nullify the provisions of Section 37(1). This cannot be the intent of the Act. In the opinion of the Board the Special Inquiry Officer did not lose jurisdiction under Section 37(1). In the circumstances of this case the fact Mrs. Moshos had made application for permanent residence is irrelevant.

The Board finds that there are legal and valid grounds to support the inclusion of Mrs. Moshos and the children under the provisions of Section 37 (1) of the Immigration Act in the deportation order made against her husband, John Moshos. In accordance with Section 14 of the Immigration Appeal Board Act it dismisses her appeal and that of the two children.

Counsel for the appellant, John Moshos, did not contest the legality and validity of the deportation order made against him. He based his appeal on Section 15 of the Immigration Appeal Board Act and asked the Board to exercise its discretion and direct a stay of execution of the said order on humanitarian grounds.

37(1), elle ne peut être considéré une personne à charge.

La Commission décide donc d'accepter l'appel de Madame Ioranides."

Dans cette instance l'enquêteur spécial après avoir lu l'article 37(1) de la Loi sur l'immigration a prévenu Mme Moshos que ses enfants et elle pourraient être compris dans l'éventuelle ordonnance d'expulsion qui pourrait être émise contre son mari; le fonctionnaire l'a aussi informée de son droit de retenir les services d'un conseiller.

La Commission estime que l'enquêteur spécial s'est conformé aux prescriptions et règlements de la Loi sur l'immigration: Mme Moshos fut informée des conclusions probables de l'enquête, quant à elle et ses enfants; on ne lui a pas nié le droit d'obtenir les services d'un conseiller et elle a reçu une audition équitable.

- b) Au support de son argument voulant montrer que l'article 37(1) était probablement nul puisque contraire à la Déclaration canadienne des droits, M. Endicott n'a pas renvoyé la Commission à quelque article de la Déclaration Canadienne (1960) S.R.C. chapitre 44. Comme il n'y a eu ni argument ni plaidoirie, au soutien de ceci, la Commission ne juge pas nécessaire de traiter de ce point.
- c) Le témoignage donné à l'enquête a montré qu'en Australie Mme Moshos occupait un emploi bien rémunéré, de tisseuse de tapis. Bien qu'elle ait déclaré à l'enquête qu'elle avait l'intention de travailler dans sa profession ou dans un autre domaine si on l'autorisait à demeurer au Canada, il n'en reste pas moins qu'à l'époque de l'enquête elle n'occupait pas d'emploi et qu'elle n'avait pas reçu l'approbation écrite d'occuper un emploi. Il s'ensuit qu'à l'époque de l'enquête elle était, comme elle l'a admis, une personne à charge. Son intention de travailler plus tard, si elle était autorisée à demeurer au Canada, ne l'exclut pas de la catégorie des personnes à charge.
- d) Le 19 mars 1968, soit dix jours après son arrivée, Mme Moshos a présenté une demande de résidence permanente. Par l'article 37 de la Loi sur l'immigration le Parlement a jugé approprié de prévoir dans l'ordonnance rendue contre le chef de famille l'inclusion des personnes à sa charge.

Despite the fact counsel for Mr. Moshos did not contest the legality of the deportation order made against him the Board nevertheless reviewed the evidence before it to ascertain if the grounds set out in the order were supported by the evidence.

At page 10 of the Inquiry Mr. Moshos admitted he had not received written permission from an officer of the Department to take employment in Canada. He admitted also that he had taken employment (Inquiry, pages 9 and 10; Exhibit "C"). At page 8 of the Inquiry he admitted he was not in possession of a letter of pre-examination and at page 12 of the Inquiry he admitted he was not in possession of the requisite medical certificate.

The Board finds ample evidence to support all the grounds set out in the deportation order made against the appellant John Moshos. It therefore dismisses his appeal under Section 14 of the Immigration Appeal Board Act.

Having dismissed the appeals on legal grounds the Board gave consideration to the exercise of its discretion under Section 15 of the Immigration Appeal Board Act. As all the appellants are non-immigrants the applicable portion of that Section is as follows:

"15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that

- (b) in the case of a person who was not a permanent resident at the time of the making of the order of deportation, having regard to
 - (i) the existence of reasonable grounds for believing that if execution of the order is carried out the person concerned will be punished for activities of a political character or will suffer unusual hardship, or
 - (ii) the existence of compassionate or humanitarian considerations that in the opinion of the Board warrant the granting of special relief,

the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

Il faut maintenir une distinction précise entre une demande de résidence présentée par un non-immigrant et les prescriptions de l'article 37. Si l'opinion de M. Endicott avait cours cela signifierait qu'un non-immigrant pourrait par une demande hâtive de résidence permanente rendre nul l'effet des prescriptions de l'article 37(1). L'intention de la Loi ne peut être telle. La Commission estime que l'enquêteur spécial n'a pas perdu sa compétence aux termes de l'article 37(1). Le fait que Mme Moshos ait présenté une demande de résidence permanente est sans portée dans cette affaire. La Commission déclare que selon l'article 37(1) de la Loi sur l'immigration des motifs légaux valident l'inclusion de Mme Moshos et ses enfants dans l'ordonnance d'expulsion rendue contre M. John Moshos, son époux. En vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission rejette son appel et celui de ses enfants.

Le conseiller de M. Moshos n'a mis en doute ni la validité ni la légalité de l'ordonnance d'expulsion rendue contre l'appelant. Il a fondé son appel sur l'article 15 en demandant que la Commission exerce sa juridiction d'équité et que pour des considérations d'ordre humanitaire elle ordonne de surseoir à l'exécution de l'ordonnance.

Bien que le conseiller de l'appelant n'ait pas contesté la légalité de l'ordonnance rendue contre M. Moshos, la Commission a néanmoins examiné la preuve administrée devant elle afin d'être certaine que la preuve supporte les motifs définis dans l'ordonnance.

A la page 10 de l'enquête M. Moshos a admis ne pas avoir reçu l'approbation écrite d'un fonctionnaire du ministère d'occuper un emploi. Il a aussi admis avoir occupé un emploi (pp. 9 et 10 de l'enquête; pièce à l'appui "C"). A la page 8 de l'enquête il a admis ne pas posséder de lettre de pré-examen et à la page 12 de l'enquête il a admis ne pas avoir de certificat médical prescrit.

La Commission déclare que la preuve supporte en tous points les motifs exprimés dans l'ordonnance d'expulsion rendue contre M. John Moshos. En conséquence, en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration, la Commission rejette l'appel.

Mr. Moshos came to Canada as a visitor on 22 November 1967 for a period to expire on 21 April 1967. He applied for permanent residence on 2 January 1968. His wife and two children also came to Canada as visitors entering this country on 9 March 1968 for a period to expire on 9 April 1968. His wife applied for permanent residence on 19 March 1968. While in Greece on 5 July 1967 he had completed an application for permanent residence in Canada but claimed he did not know the application had been refused. He has taken unauthorized employment in this country and at the time of the Inquiry was earning a salary of approximately \$100.00 per week. His assets in Canada consist of furniture which he values at \$500.00 and on which he owes approximately \$200.00 as well as \$50.00 in the Bank of Nova Scotia. He also had a loan of approximately \$500.00 from the bank. He has no assets outside Canada. With the exception of his wife and children Mr. Moshos has no close relatives in Canada. He has no real roots in this country nor is his employment of vital importance to his employer.

Mrs. Moshos at the Inquiry stated (page 22)

"Q. If your husband was not allowed to remain in Canada would you want to stay here without him or go with him?

A. I will go with my husband wherever he goes."

whereas at the Appeal hearing she said (page 19)

"Q. You would like to stay in Canada without your husband?

A. Yes.

Q. If he is deported and you were allowed to stay, you would stay?

A. Yes, I have two kids, you know, and my kids go to school. I like to stay and my kids like it here. Its best country for my kids, it come big, you know, go to school, its best country."

There is no evidence that any of the appellants will be punished for activities of a political character if they should be deported. It cannot be said they will suffer unusual hardship if they are returned to Australia, as they were both gainfully employed there. The fact this family - which must be treated as a unit - wishes to remain in Canada for economic reasons and to bring up their family is not in the Board's opinion a sufficient compassionate or humanitarian ground which warrants special relief being granted in this case.

La Commission, après avoir rejeté les appels pour des motifs légaux, examine l'affaire sous l'article 15 de la Loi sur la Commission d'appel de l'immigration. Puisque tous les appelants sont non-immigrants la partie pertinente de cette article est la suivante:

- "15.(1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que
- b) dans le cas d'une personne qui n'était pas un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu
 - (i) de l'existence de motifs raisonnables de croire que, si l'on procède à l'exécution de l'ordonnance, la personne intéressée sera punie pour des activités d'un caractère politique ou soumise à de graves tribulations, ou
 - (ii) l'existence de motifs de pitié ou de considérations d'ordre humanitaire qui, de l'avis de la Commission, justifient l'octroi d'un redressement spécial,
- la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement."

Le 22 novembre 1967 M. Moshos est arrivé au Canada à titre de visiteur; son permis de séjour s'achevait le 21 avril 1967. Le 2 janvier 1968 il déposait une demande de résidence permanente. Le 9 mars 1968 son épouse et ses enfants sont arrivés au Canada à titre de visiteurs; leur permis de séjour s'achevait le 9 avril 1968, date à laquelle Mme Moshos déposait une demande de résidence permanente. Le 5 juillet 1967, alors que M. Moshos était en Grèce, il a présenté une demande de résidence permanente au Canada, il a prétendu ne pas savoir que sa demande avait été refusée. Au Canada il a occupé un emploi sans l'approbation d'un fonctionnaire du ministère et à l'époque de l'enquête il touchait un salaire hebdomadaire de soixante dix dollars. Au Canada la liste de ses biens s'établissait ainsi: 1) meubles que l'appelant évalue à 500 dollars sur lesquels il doit rembourser environ 200 dollars; 2) 50 dollars déposés à la banque de Nouvelle Ecosse; 3) à cette banque il a contracté un emprunt d'environ 500 dollars. Il ne possède aucun

The Board therefore declines to exercise its discretion under Section 15 of the Immigration Appeal Board Act and directs that the deportation order be executed as soon as practicable.

Concurred in by: U. Benedetti and J.A. Byrne.

For the appellant: C. Amourgis and N.A. Endicott, Barristers &
Solicitors

for the respondent: J.T. Pasman, Esq.

bien à l'extérieur du Canada. En dehors de son épouse et de ses enfants M. Moshos n'a pas de parentée dans ce pays. Il n'a pas établi de lien solide au Canada, et son employeur ne considère pas que l'appelant occupe un poste clé dans l'entreprise.

A la page 22 de l'enquête Mme Moshos a déclaré:

"Q. If your husband was not allowed to remain in Canada would you want to stay here without him or go with him?

A. I will go with my husband wherever he goes."

tandis qu'à la page 19 de l'audition de l'appel elle déclarait:

"Q. You would like to stay in Canada without your husband?

A. Yes.

Q. If he is deported and you were allowed to stay, you would stay?

A. Yes, I have two kids, you know, and my kids go to school. I like to stay and my kids like it here. Its best country for my kids, it come big, you know, go to school, its best country."

Il n'existe aucune preuve que s'ils étaient expulsés les appelants seraient punis pour des activités d'un caractère politique. On ne peut pas dire que s'ils retournaient en Australie ils souffriraient de graves tribulations puisque là-bas les parents occupaient un emploi bien rémunéré. Dans cette affaire le fait que cette famille - qui doit être considérée en tant qu'unité - désire demeurer au Canada pour des raisons économiques et pour élever les enfants ne constitue pas, selon la Commission, un motif de pitié ou d'ordre humanitaire suffisant pour justifier l'octroi d'un redressement spécial.

En conséquence, la Commission se refuse à exercer ses pouvoirs discrétionnaires prévus à l'article 15 de la Loi sur la Commission d'appel de l'immigration, et elle ordonne que l'ordonnance d'expulsion soit exécutée aussitôt que possible.

Ont souscrit: U.Benedetti et J.A. Byrne

Pour l'appelant: Mes C. Amourgis et N.A. Endicott;
pour l'intimé: M. J.T. Pasman.

17.

Jorge Alfredo BELT-Y-DE CARDENAS,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 17, 1969;
File: 68-6174

Coram: Miss J.V. Scott, Chairman, Gérard Legaré, U. Benedetti.

A person who seeks to come into Canada from the United States.- Border - nature of - when admittance occurs - S.23 Report.- Whether further examination or Inquiry .- Immigration Act: 24(1)(2) - Immigration Regulations: 27(1), 28(1), 29(1).

Held: The Board having considered and evaluated all its previous decisions, the appellant was not a person who "seeks to come into Canada from the United States." Such a person must be legally (as opposed to geographically) out of the country. The appellant therefore should have been the subject of a full inquiry, pursuant to S. 24(2) of the Immigration Act, rather than a further examination pursuant to S. 24(1), and failure to hold such an inquiry was a defect in substance as well as in procedure. Appeal allowed.-

The judgment of the Board was delivered by:

J.V. Scott:

The order of deportation reads:

- "(1) you are not a Canadian citizen,
- (2) you are not a person having Canadian domicile, and that
- (3) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of the fact that you are not in possession of an unexpired passport issued to you by the country of which you are a subject or citizen as required by subsection (1) of Section 27 of the Immigration Regulations, Part 1, amended of the Immigration Act and you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part 1, amended of the Immigration Act and your passport does not bear a medical certificate duly signed by a medical officer,

17.

Jorge Alfredo BELT-Y-DE CARDENAS,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'immigration,

intimé.

Date de la décision: le 17 mars 1969;
Dossier: 68-6174.

Coram: Mlle J.V. Cott, président, Gérard Legaré, U. Benedetti.

Personne cherchant à entrer au Canada depuis les Etats-Unis - Frontière-nature de - quand a lieu admission - rapport en vertu de l'a. 23 - enquête complémentaire ou enquête - Loi sur l'immigration: 24(1)(2) - Règlement de l'immigration: 27(1), 28(1), 29(1).

Arrêt: A la lumière de la jurisprudence de la Commission, l'appelant n'était pas une personne cherchant à entrer au Canada depuis les Etats-Unis; il aurait donc dû faire l'objet d'enquête conformément à l'a. 24 (2) de la Loi sur l'immigration plutôt que d'une enquête complémentaire en vertu de l'a. 24(1). - Le défaut de tenir une telle enquête est un vice de fond et de forme. L'appel doit être accueilli à toutes fins que de droit.

Le jugement de la Commission fut rendu par:

Mlle J.V. Scott, président:

L'ordonnance d'expulsion dit:

- "(1) you are not a Canadian citizen,
- (2) you are not a person having Canadian domicile, and that
- (3) you are a member of the prohibited class of persons described in paragraph (t) of section 5 of the Immigration Act in that you cannot fulfil or comply with the conditions or requirements of this Act or Regulations by reason of the fact that you are not in possession of an unexpired passport issued to you by the country of which you are a subject or citizen as required by subsection (1) of Section 27 of the Immigration Regulations, Part 1, amended of the Immigration Act and you are not in possession of a valid and subsisting immigrant visa as required by subsection (1) of section 28 of the Immigration Regulations, Part 1, amended of the Immigration Act and your passport

nor are you in possession of a medical certificate in the form prescribed by the Minister, as required by subsection (1) of section 29 of the Immigration Regulations, Part 1, amended of the Immigration Act."

The facts of this case are as follows: The appellant is a thirty-four year old citizen of Cuba, unmarried, a graduate of Lasalle College in Havana. After 1953 he attended various universities in the United States, but returned to Cuba from time to time, until 1958, when he left that country for the last time. He then travelled in Europe until 1960, when he settled in England and obtained employment as a market research analyst there. On May 27, 1967, he arrived in Canada, with the intention of visiting Expo, and was admitted to this country as a non-immigrant for a period of five weeks. At that time he was in possession of a Cuban passport issued at Havana February 14, 1966, but obtained by him at the Cuban Embassy in London, England. This passport was valid until 1971. It was subsequently stolen from him sometime during his stay in Canada.

On June 5, 1967, the appellant applied for permanent admission to Canada at the Montreal Office of the Canada Immigration Division, Department of Manpower and Immigration. He withdrew this application on August 8, 1967, requesting instead a temporary stay in this country for a period of one year, with permission to work. This was refused, and a letter was given to the appellant requesting him to leave Canada before August 21, 1967. The appellant, however, remained in Montreal and changed his name to avoid detection by Canada Immigration officials - a fact which he freely admitted.

The appellant did not work in Canada until after his first appearance before the Board on January 7, 1969. He was supported by his mother who is a legal resident of the United States, having entered that country as a Cuban refugee in 1962.

Around December 1967 the appellant voluntarily entered a mental hospital in Montreal for treatment of a recurrent illness from which he had suffered for many years. He remained in hospital for some seven weeks. Mr. Cardenas, a highly intelligent and articulate man, testified before the Board that he had been hospitalized a number of times in Cuba and in the United States because of this illness, which had been diagnosed as chronic undifferentiated schizophrenia. In Canada, however, his illness was diagnosed as "acute situational maladjustment". In support of this statement, he filed a letter dated January 3, 1969, on the letterhead of the Douglas Hospital, Montreal, addressed to his counsel (Exhibit A at the hearing on January 6, 1969), in the following terms:

does not bear a medical certificate duly signed by a medical officer, nor are you in possession of a medical certificate in the form prescribed by the Minister, as required by subsection (1) of section 29 of the Immigration Regulations, Part 1, amended of the Immigration Act."

Dans cette affaire les faits sont les suivants: l'appelant, citoyen cubain, est âgé de trente-quatre ans, célibataire, et diplômé du Collège Lasalle à la Havane. Après 1953, il a suivi des cours dans diverses universités des Etats-Unis, mais de temps en temps il retournait à Cuba, ceci jusqu'en 1958 année à laquelle il quitta son pays pour la dernière fois. En suite il a voyagé en Europe jusqu'en 1960; cette année-là il s'est établi en Angleterre et y a obtenu un emploi d'analyste chercheur dans les marchés. Le 27 mai 1967 il est arrivé au Canada avec l'intention de visiter l'Expo; il a été admis à titre de touriste, son permis de séjour expirait cinq semaines après son entrée. A cette époque il possédait un passeport cubain émis le 14 février 1966 à la Havane; ce passeport lui avait été délivré en Angleterre par l'ambassade du Cuba à Londres. Ce passeport était valide jusqu'en 1971. Durant son séjour au Canada, ce passeport lui a été volé.

Le 5 juin 1967 l'appelant dépose une demande de résidence permanente auprès des autorités canadiennes de l'immigration à Montréal. Le 8 août 1967 il retire cette demande et à la place de celle-ci sollicite l'autorisation de séjourner temporairement pour une durée d'une année et d'occuper un emploi. Ceci lui a été refusé et il a reçu une lettre le sommant de quitter le Canada avant le 21 août 1967. L'appelant est, cependant, resté à Montréal, sous un faux nom afin de ne pas être découvert par les autorités de l'immigration (fait qu'il a ouvertement admis).

L'appelant n'a travaillé au Canada qu'après sa première comparution devant la Commission, soit le 7 janvier 1969. Il était à la charge de sa mère qui est une citoyenne des Etats-Unis: elle y est entré en 1962 à titre de réfugié cubain.

Aux environs du mois de décembre 1967 l'appelant a demandé à être hospitalisé dans un établissement psychiatrique de Montréal pour s'y faire soigner d'une maladie chronique dont il souffrait depuis plusieurs années auparavant. Il est resté dans cet hôpital pendant sept semaines. M. Cardenas, homme très intelligent et d'expression facile, a déclaré devant la Commission avoir été hospitalisé plusieurs fois, à Cuba et aux Etats-Unis, à cause de sa maladie diagnostiquée comme une schizophrénie chronique. Au Canada, toutefois cette maladie a été diagnostiquée comme forte désadaptation aux situations. Au support de cette déclaration il a déposé une lettre datée du 3 janvier

"DOUGLAS HOSPITAL

HOPITAL DOUGLAS

January 3, 1969.

Mr. Denis Brown,
380 Frank Street,
Ottawa, Ontario.

Dear Mr. Brown:

I am enclosing a copy of the letter originally sent to the American Consulate in Montreal. I believe that its content is still valid in regard to the Psychiatric Assessment of Mr. Belt. I hope this will be of some help.

Yours sincerely,

Barbara Higgins (signed)
for L. Vacaflor, M.D.,
Senior Psychiatrist."

The copy of Dr. Vacaflor's letter to the United States Consulate General, dated February 27, 1968, contains the statement

"He (the appellant) is now recovered and should be able to continue operating at the level of his intellectual abilities.

Diagnosis: Acute Situational Maladjustment (326.3
International Classification)."

Mr. Cardenas explained this last diagnosis (transcript of hearing January 7, 1969, page 19):

"This is not insanity, it is not a psychosis, it is not even a neurosis. It is a character disorder."

The appellant also testified that for many years he had wanted to be admitted as a permanent resident in the United States, where his mother, sister and brother-in-law and other relatives reside, but that he had been given to understand that because of his mental condition he would be absolutely barred from admission to that country. He therefore made no effort to obtain a United States immigrant visa during his residence in England. After he came to Canada as a non-immigrant visitor, he discovered that there was a waiver provision in the United States Immigration and Nationality Act which might be applicable to him and he then, at about the same time as he applied for permanent residence in Canada, applied for a United States immigrant visa at the Consulate General of the United States in Montreal. He filed with the Board a letter

1969 à l'en-tête de Douglas Hospital situé à Montréal; cette lettre adressée à son conseiller (pièce à l'appui "A" à l'audition du 6 janvier 1969) dit:

"DOUGLAS HOSPITAL

HOPITAL DOUGLAS

January 3, 1969.

Mr. Denis Brown,
380 Frank Street,
Ottawa, Ontario.

Dear Mr. Brown:

I am enclosing a copy of the letter originally sent to the American Consulate in Montreal. I believe that its content is still valid in regard to the Psychiatric Assessment of Mr. Belt. I hope this will be of some help.

Yours sincerely,

Barbara Higgins (signed)

For L. Vacaflor, M.D.,
Senior Psychiatrist."

Une copie de la lettre du Dr. Vacaflor adressée le 27 février 1968 au Consulat général des Etats-Unis contient la déclaration suivante:

"He (the appellant) is now recovered and should be able to continue operating at the level of his intellectual abilities.

Diagnosis: Acute situational maladjustment (326.3 International classification)."

M. Cardenas a commenté ce diagnostique (transcription de l'audition du 7 janvier 1969 p. 19):

"this is not insanity, it is not a psychosis, it is not even a neurosis. It is a character disorder."

L'appelant a aussi déclaré que durant plusieurs années il a désiré être admis aux Etats-Unis en vue d'y résider d'une façon permanente; dans ce pays demeurent sa mère, sa soeur, son beau-frère et autre parenté mais on lui a laissé entendre qu'à cause de sa santé mentale il n'avait aucune chance d'être admis dans ce pays. En conséquence, alors qu'il vivait en Angleterre il n'a entrepris aucune démarche pour obtenir des Etats-Unis un visa d'immigrant. Après son arrivée au Canada à titre de visiteur, il a découvert que the United

under the letterhead of the Consulate, dated January 3, 1969, apparently signed by Janet M. Ansorge, Vice Consul, addressed to his counsel, the first paragraph of which reads as follows:

"I refer to our telephone conversation of January 3, 1969 regarding Mr. Jorge Alfredo Belt y de Cardenas. Mr. Belt was refused an immigrant visa at this office under Section 212(a)(4) of the Immigration and Nationality Act. Section 212(a)(4) of the Act relates to aliens "afflicted with psychopathic personality, or sexual deviation, or a mental defect." Mr. Belt was found ineligible as a person afflicted with a "Mental Defect, Schizophrenic Reaction, residual type." A refusal under this section of the law is statutory and permanent in nature. There is no relief available."

Mr. Cardenas testified before the Board that, while he still wanted to go to the United States to live, if he could not be admitted there he wanted to remain in Canada, where he is reasonably close to his relatives. He does not wish to return to England; he was very unhappy there and opportunities for work in his chosen field are poor. He cannot return to Cuba. Although he himself was not active in politics, members of his family were, one uncle having been Cuban Ambassador to the United States under the pre-Batista regime. Before the Castro regime came into power, the family belonged to what Mr. Cardenas termed the Cuban Establishment, and as a member of that family the appellant would now be in danger of persecution and imprisonment if he returned to his native land. He testified that some relatives are presently serving jail sentences in Cuba, because of their political affiliations.

On December 6, 1968, the appellant tried to get into the United States by bus, crossing from Windsor to Detroit. He was interviewed briefly by the United States Immigration officials at the border post, and was refused entry. He immediately returned to Windsor, where an examination by a Canadian Immigration officer resulted in the section 23 report filed as an exhibit to the summary of the further examination conducted by the Special Inquiry Officer. The summary of this examination shows that Mr. Cardenas told the Special Inquiry Officer that he was seeking admission to Canada as an immigrant. He confirmed this at the hearing of his appeal. The deportation order, above quoted, was made against him the same day, December 6, 1968.

It will be noted that the Special Inquiry Officer conducted a further examination, not an inquiry, in respect of the appellant. The relevant section of the Immigration Act is section 24, which reads as follows:

States Immigration and Nationality Act prévoit une disposition dérogatoire qui aurait pu le viser, par suite, à peu près à l'époque de sa demande de résidence permanente au Canada, il demandait un visa d'immigrant au Consulat Général des Etats-Unis à Montréal. Il a déposé, auprès de la Commission, une lettre datée du 3 janvier 1969 à l'en-tête du Consulat et de toute évidence signée par le Vice-consul, M. Janet M. Ansorge; cette lettre adressée à son conseiller dit au premier paragraphe:

"I refer to our telephone conversation of January 3, 1969 regarding Mr. Jorge Alfredo Belt y de Cardenas. Mr. Belt was refused an immigrant visa at this office under Section 212(a)(4) of the Immigration and Nationality Act. Section 212(a)(4) of the Act relates to aliens "afflicted with psychopathic personality, or sexual deviation, or a mental defect." Mr. Belt was found ineligible as a person afflicted with a "Mental Defect, Schizophrenic Reaction, residual type." A refusal under this section of the law is statutory and permanent in nature. There is no relief available."

M. Cardenas a déclaré devant la Commission que bien qu'il veuille toujours aller vivre aux Etats-Unis, il voudrait rester au Canada où il n'est pas trop loin de sa parentée s'il ne pouvait être admis là-bas. Il ne désire pas retourner en Angleterre où il a été très malheureux; de plus ce pays ne lui a offert que très peu de possibilités de travail dans sa profession. Il ne peut pas retourner à Cuba. Bien qu'il ne se soit pas occupé de politique d'une manière active, des membres de sa famille l'ont été, ainsi un de ses oncles a été ambassadeur de Cuba aux Etats-Unis sous le régime pre-Batista. Avant l'arrivée de M. Castro au pouvoir, selon les termes de M. Cardenas, sa famille appartenait à la classe dirigeante, en tant que membre de cette famille l'appelant pourrait à présent être persécuté et emprisonné s'il retournait dans son pays natal. Il a déclaré que quelques membres de sa famille purgeaient actuellement des peines d'emprisonnement à cause de leurs attaches politiques.

Le 6 décembre 1968, l'appelant a essayé d'entrer aux Etats-Unis en prenant l'autobus qui va de Windsor à Detroit, au poste frontière il a eu une entrevue sommaire avec un fonctionnaire à l'immigration américaine et s'est vu refusé l'entrée. Immédiatement après cela, il est retourné à Windsor, où il a subi un examen donné par un fonctionnaire à l'immigration canadienne; suite à cet examen on a émis un rapport prévu à l'article 23 qui a été déposé en pièce à l'appui au sommaire de l'enquête supplémentaire tenue par l'enquêteur spécial. Le sommaire

- "24(1) Where the Special Inquiry Officer receives a report under section 23 concerning a person who seeks to come into Canada from the United States of America, Alaska or St. Pierre and Miquelon, he shall, after such further examination as he may deem necessary and subject to any regulations made in that behalf, admit such person or let him come into Canada or make a deportation order against such person, and in the latter case such person shall be returned as soon as practicable to the place whence he came to Canada.
- (2) Where the Special Inquiry Officer receives a report under section 23 concerning a person, other than a person referred to in subsection (1), he shall admit him or let him come into Canada or may cause such person to be detained for an immediate inquiry under this Act."

In the circumstances of this case, the Special Inquiry Officer had no authority to conduct a further examination rather than an inquiry, unless it can be shown that Mr. Cardenas was a person seeking "to come into Canada from the United States of America". The appellant was refused entry into the United States at the United States border post. Presumably, he had physically crossed the geographical boundary between the two countries, and Mr. Craddock, who very properly drew the Board's attention to the problem, argued that the words "from the United States" in section 24(1) had a geographical connotation, and that therefore the Special Inquiry Officer was right in proceeding under that subsection. In support of this contention, he cited the case of Baruch v. the Minister of Manpower and Immigration, Immigration Appeal Board, August 8, 1968, unreported. The facts of this case are as follows: Baruch, a citizen of Israel, was admitted to the United States in June 1967, and resided there, legally, until June 9, 1968, when he was admitted to Canada as a non-immigrant visitor until June 26, 1968. On June 28, 1968, he endeavoured to return to the United States, but was refused entry at the border, and returned to the Canadian Immigration border post, where a further examination was held and a deportation order issued against him. His appeal was dismissed. During the hearing of the appeal, there was some discussion between Mr. N. Thurm, counsel for the respondent and the Chairman at the hearing, Me. Jean-Paul Geoffroy, and the members of the panel. This is to be found at pages 8, 9 and 10 of the transcript, and is as follows:

de cet examen montre que M. Cardenas a déclaré à l'enquêteur spécial son intention d'être admis au Canada à titre d'immigrant. Il a confirmé ceci à l'audition de son appel. L'ordonnance d'expulsion, ci-dessus citée, a été rendue contre lui le même jour, soit le 6 décembre 1968.

Notons qu'à l'égard de l'appelant l'enquêteur spécial a tenu une enquête supplémentaire (further examination) et non une enquête (inquiry). L'article pertinent de la Loi sur l'immigration est l'article 24 qui dit:

"24(1) Lorsque l'enquêteur spécial reçoit un rapport prévu à l'article 23 sur une personne qui cherche à venir au Canada des Etats-Unis d'Amérique, de l'Alaska ou de Saint-Pierre-et-Miquelon, il doit, après l'enquête complémentaire qu'il juge nécessaire et sous réserve de tous règlements établis à cet égard, admettre cette personne ou lui permettre d'entrer au Canada, ou rendre contre elle une ordonnance d'expulsion et, dans ce dernier cas, ladite personne doit, le plus tôt possible, être renvoyée au lieu d'où elle est venue au Canada.

(2) Lorsque l'enquêteur spécial reçoit un rapport prévu par l'article 23 sur une personne autre qu'une personne mentionnée au paragraphe (1), il doit l'admettre ou la laisser entrer au Canada, ou il peut la faire détenir en vue d'une enquête immédiate sous le régime de la présente loi."

Dans cette affaire, l'enquêteur spécial n'avait pas la compétence de tenir une enquête supplémentaire plutôt qu'une enquête à moins qu'il ne soit démontré que M. Cardenas était une personne qui cherchait "à venir au Canada des Etats-Unis d'Amérique". Au poste frontière américain l'appelant s'est vu refuser l'entrée aux Etats-Unis. On peut supposer que l'appelant avait franchi la limite géographique entre les deux pays, et M. Craddock qui avec raison a attiré l'attention de la Commission sur ce point a soutenu que dans l'article 24(1) l'expression "des Etats-Unis" a un sens géographique et que par conséquent l'enquêteur spécial a eu raison de procéder aux termes de cet alinéa. Au support de son allégation, il a cité l'affaire Baruch c. Le Ministre de la Main-d'oeuvre et de l'immigration, C.A.I., le 8 août 1968 (non rapporté). Dans cette affaire les faits sont les suivants: M. Baruch, citoyen israélien a été admis aux Etats-Unis en juin 1967; il y demeurait aux termes de la Loi, quand le 9 juin 1968 il fut admis au Canada à titre de touriste, son permis de séjour expirait le 26 juin 1968. Le 28 juin 1968 il a entrepris de retourner aux Etats-Unis, mais à la frontière

"BY CHAIRMAN:

I wonder why this man has not been completely examined through a Special Inquiry; why has he been only dealt with by further ...

BY MR. THURM:

I believe that is because he is coming from the United States and under Section 23, if he is coming from the United States, he is dealt with by a further examination.

BY CHAIRMAN:

At that time he was in Canada.

BY MR. THURM:

No, he had gone from Canada to the United States. He got as far as the U.S. immigration station and was sent back to Canada. Once he left the U.S. immigration station he is out of Canada but he was returning again.

BY CHAIRMAN:

This is the problem. Can you say that you have left the country from where you come from.

BY MR. THURM:

I would think so. I do not think we can take the position that the U.S. immigration office is in Canada, it has to be out of the country. Surely when he crosses the boundary he is out of the country.

BY CHAIRMAN:

Legally.

BY MR. THURM:

Yes.

BY CHAIRMAN:

Even though he is not admitted in that country?

s'est vu refusé l'entrée, il est donc retourné au poste frontière de l'immigration canadienne, où une ordonnance d'expulsion émise contre lui a été précédée d'une enquête supplémentaire. Son appel a été rejeté. Au cours de l'audition de l'appel le conseiller de l'intimé M. N. Thurm le président de l'audition, M. J.-P. Geoffroy ainsi que les membres du coram différaient d'opinions, comme le montre les pages 8, 9 et 10 de la transcription:

"BY CHAIRMAN:

I wonder why this man has not been completely examined through a Special Inquiry; why has he been only dealt with by further ...

BY MR. THURM:

I believe that is because he is coming from the United States and under Section 23, if he is coming from the United States, he is dealt with by a further examination.

BY CHAIRMAN:

At that time he was in Canada.

BY MR. THURM:

No, he had gone from Canada to the United States. He got as far as the U.S. immigration station and was sent back to Canada. Once he left the U.S. immigration station he is out of Canada but he was returning again.

BY CHAIRMAN:

This is the problem. Can you say that you have left the country from where you come from.

BY MR. THURM:

I would think so. I do not think we can take the position that the U.S. immigration office is in Canada, it has to be out of the country. Surely when he crosses the boundary he is out of the country.

BY MR. THURM:

Yes, even though he was not legally admitted to the United States. His period, when he came on June 9th, was to June 26th. That period had expired when he returned to the United States but I think he was out of the country, he was in the United States, and that brings him within Section 23 as a person coming to Canada from the United States so a further examination procedure would be the right procedure.

BY MR. WESELAK:

The fact he was physically out of the country?

BY MR. THURM:

Yes. I think that could be the only interpretation you could put on that provision.

BY CHAIRMAN:

This surprised me, the question is how can you say someone is in another country when he has not been admitted into this country. I am speaking of it legally. One can put one's feet across the border but there is no very rigid line. You can never say the American Port of Entry right on the line or fifteen feet from the line do you have to get into the country. I was not thinking in terms of physical situation or geography but in terms of legally speaking. When you are not allowed to get into a country can you say that you have been in this country?

BY MR. THURM:

Coming from that country. I think so. He had passed through the Canadian immigration station and customs. He had passed out of Canada. He must have passed somewhere and the only place he could go was the United States.

BY CHAIRMAN:

Suppose the Port of Entry in Canada is a hundred feet from the border, from the line, and suppose that the American Port of Entry is right on the line, and you are not allowed to open the door because you are being told by the United States "we won't admit you".

BY CHAIRMAN:

Legally.

BY MR. THURM:

Yes.

BY CHAIRMAN:

Even though he is not admitted in that country?

BY MR. THURM:

Yes, even though he was not legally admitted to the United States. His period, when he came on June 9th, was to June 26th. That period had expired when he returned to the United States but I think he was out of the country, he was in the United States, and that brings him within Section 23 as a person coming to Canada from the United States so a further examination procedure would be the right procedure.

BY MR. WESELAKE:

The fact he was physically out of the country?

BY MR. THURM:

Yes. I think that could be the only interpretation you could put on that provision.

BY CHAIRMAN:

This surprised me, the question is how can you say someone is in another country when he has not been admitted into this country. I am speaking of it legally. One can put one's feet across the border but there is no very rigid line. You can never say the American Port of Entry right on the line or fifteen feet from the line do you have to get into the country. I was not thinking in terms of physical situation or geography but in terms of legally speaking. When you are not allowed to get into a country can you say that you have been in this country?

BY MR. THURM:

That is a rather unusual situation. My recollection of the Ports of Entry is that the door is usually on the side that runs not parallel to the border but at right angles to it and in order to get to the door you would have to be in the United States. I was trying to remember the section in the Immigration Act but there are some provisions that recognize the difference between coming through the United States to Canada and coming from the United States. Of course, that does not apply here either. He was not coming through the United States because he just went there and came back but I would think the physical presence, across the border in the United States, is all that is necessary for the purposes of Section 23."

The Board's judgment was rendered orally by the Chairman. The relevant part of this judgment reads (page 25 of the transcript):

"The Board, after considering the evidence and the arguments, came to the conclusion that because of the fact that the Appellant's non-immigrant visa had expired on the 26th of June and that he had applied for a new non-immigrant visa, the Examining Officer was right to consider him as a person seeking admission to Canada and seeking admission as of his first entry, meaning coming from the United States."

The Baruch case is clearly distinguishable from the instant appeal. Baruch had originally come into Canada from the United States, where he had actually resided, and he was therefore considered as seeking admission to this country "as of his first entry". By implication, the second "entry" was no entry, since he had been refused admission to the United States at that time.

The Board's decision in the case of Grabczak v. Minister of Manpower and Immigration (Immigration Appeal Board, October 25, 1968, unreported) is of interest. There the appellants, a mother and son, who were legal visitors to the United States and temporarily residing there, were admitted to Canada as non-immigrant visitors for a weekend, to visit Niagara Falls. On the Sunday, they sought to return to the United States and were refused admission. They came back to the Canadian Immigration border post requesting admission to Canada as non-immigrants for an

BY MR. THURM:

Coming from that country. I think so. He had passed through the Canadian immigration station and customs. He had passed out of Canada. He must have passed somewhere and the only place he could go was the United States.

BY CHAIRMAN:

Suppose the Port of Entry in Canada is a hundred feet from the border, from the line, and suppose that the American Port of Entry is right on the line, and you are not allowed to open the door because you are being told by the United States 'we won't admit you'.

BY MR. THURM:

That is a rather unusual situation. My recollection of the Ports of Entry is that the door is usually on the side that runs not parallel to the border but at right angles to it and in order to get to the door you would have to be in the United States. I was trying to remember the section in the Immigration Act but there are some provisions that recognize the difference between coming through the United States to Canada and coming from the United States. Of course, that does not apply here either. He was not coming through the United States because he just went there and came back but I would think the physical presence, across the border in the United States, is all that is necessary for the purposes of Section 23."

Le président a signifié oralement le jugement dans cette affaire. La partie pertinente de ce jugement dit (p. 25 de la transcription):

'The Board, after considering the evidence and the arguments, came to the conclusion that because of the fact that the Appellant's non-immigrant visa had expired on the 26th of June and that he had applied for a new non-immigrant visa, the Examining Officer was right to consider him as a person seeking admission to Canada and seeking admission as of his first entry, meaning coming from the United States.'

indefinite period. A section 23 report was made and after a further examination, deportation orders were issued against them. Their appeals were allowed. In its reasons for judgment, given by J.C.A. Campbell, Vice-Chairman of the Board, the Board held (at pages 2 and 3)

"There is nothing contained in the summary of the further examination which states definitely when their non-immigrant status in Canada was to expire on Sunday, 1st September. When they crossed the geographical border between our two countries and sought admission into the United States of America they were still, in the opinion of the Board, legally in and remained in Canada, for the purposes of the Immigration Act, unless and until they had been admitted legally into the United States. Crossing the geographical border is, in itself, not sufficient to cause these appellants to lose their legal status in Canada.

The Board finds that the appellants had not lost their legal status as non-immigrants in Canada. They were not therefore persons "seeking to come into Canada" and the provisions of section 23 of the Immigration Act did not apply to them. It follows therefore that the Special Inquiry Officer did not have jurisdiction to issue the two deportation orders."

It must be noted that in the Grabczak case, it was the interpretation of the words "seeking to come into Canada" in section 23 of the Immigration Act that was the point directly in issue. The Grabczaks failed to come within this provision when they crossed the Rainbow Bridge into Canada the second time, since they were already in Canada, since they had been admitted as non-immigrants the previous day and had not left Canada before the expiry of their non-immigrant status. The basic principle, however, is clearly stated, namely that the mere crossing of the geographical border between Canada and the United States does not imply departure from Canada, or subsequent re-entry into this country, unless and until the person concerned has been "legally (i.e., not merely geographically) admitted into the United States".

In the case of Spann v. Minister of Manpower and Immigration (Immigration Appeal Board, December 5, 1968, unreported), the female appellant, a landed immigrant in Canada, endeavoured to enter the United States at a border post and was refused. She returned to the Canadian Immigration border post, where a section 23 report was made, followed by

L'affaire Baruch se distingue aisément de cette instance. La première fois Baruch est venu au Canada des Etats-Unis, où en fait il est demeuré, en conséquence on a considéré qu'il cherchait à être admis dans ce pays "as of his first entry". Conséquemment la seconde "entrée" n'était pas une entrée, puisque à cette époque il s'était vu refusé l'admission aux Etats-Unis.

La décision de la Commission dans l'affaire Grabczak c. le Ministre de la Main-d'oeuvre et de l'immigration (C.A.I., 25 octobre 1968, non-rapporté) intéresse le présent appel. Dans l'affaire Grabczak les appelants, la mère et son fils, étaient légalement visiteurs aux Etats-Unis et y demeuraient temporairement; ils ont été admis au Canada à titre de visiteurs pour une fin de semaine afin de visiter les chutes du Niagara. Le dimanche il cherchait à retourner aux Etats-Unis mais se voyaient refuser l'admission. Ils sont retournés au poste frontière de l'immigration canadienne pour y demander l'admission pour une période indéterminée. Un rapport prévu à l'article 23 a été établi et après une enquête une ordonnance d'expulsion était rendue contre eux, la Commission a accueilli leurs appels.

Le vice président de la Commission, M. J.C.A. Campbell, dans les motifs de la décision a déclaré (p. 2 et 3):

"There is nothing contained in the summary of the further examination which states definitely when their non-immigrant status in Canada was to expire on Sunday, 1st September. When they crossed the geographical border between our two countries and sought admission into the United States of America they were still, in the opinion of the Board, legally in and remained in Canada, for the purposes of the Immigration Act, unless and until they had been admitted legally into the United States. Crossing the geographical border is, in itself, not sufficient to cause these appellants to lose their legal status in Canada.

The Board finds that the appellants had not lost their legal status as non-immigrants in Canada. They were not therefore persons "seeking to come into Canada" and the provisions of section 23 of the Immigration Act did not apply to them. It follows therefore that the Special Inquiry Officer did not have jurisdiction to issue the two deportation orders."

a further examination which resulted in a deportation order. Her appeal was allowed. In its reasons for judgment, handed down by M. Jean-Pierre Houle, member, the Board held (pages 3 and 4):

"L'enquête complémentaire prévue à l'article 24(1) n'a lieu que dans les cas de personnes qui cherchent à venir au Canada des Etats-Unis d'Amérique, de l'Alaska ou de Saint-Pierre-et-Miquelon. La question se pose de savoir si l'appelante tombe dans une telle catégorie de personnes? A cette question précise posée par le président audiencier, le procureur de l'intimé a répondu:

"This has been a problem with the Department in previous occasions and the Department has had to adopt the position that a person who crosses the International Boundary into the United States has physically left the country. And on their return, if they have been refused by United States Immigration authorities, even though they have technically been at the door knocking, seeking admission to that country and have been denied, they are in effect on their return to Canada seeking to come into this country."

- Chairman: In sort of limbo?"

- "Mr. Lepitre: they are in sort of a limbo, yes."

- "Chairman: Is that possible?"

Le procureur de l'intimé fit ensuite référence, sans autre mention, à l'affaire George Christian Hannah mais n'a pas élaboré sur la pertinence de cette affaire au présent appel.

La prétention du procureur de l'intimé, en cette matière, ne résiste pas à l'examen. Il déclare tout d'abord qu'il s'agit d'une position prise par le ministère et le contexte suggère une position prise arbitrairement; à tout le moins le procureur de l'intimé ne donne aucun fondement juridique à cette position.

Retenons bien les termes de sa déclaration:

"a person who crosses the International Boundary into the United States has physically left the country. And on their return, if they have been refused by United States Immigration authorities, even though they have technically been at the door knocking, seeking admission to that country and have been denied..."

Notons que dans l'affaire Grabczak, le litige portait sur l'interprétation de l'expression "cherche à venir au Canada" tirée de l'article 23 de la Loi sur l'immigration. Cette disposition ne pouvait viser les Grabczaks quand pour la seconde fois ils ont traversé le Rainbow Bridge pour se diriger vers l'immigration canadienne, puisqu'ils étaient déjà au Canada, puisque le samedi ils avaient été admis à titre de visiteur et qu'il n'avaient pas quitté le Canada avant l'expiration de leur statut de non-immigrant. Cependant le principe de base est clairement défini, à savoir: le simple fait qu'une personne passe la frontière géographique située entre le Canada et les Etats-Unis ne signifie pas que la personne intéressée a quitté le Canada, ou qu'elle doit re-entrer dans ce pays, à moins et jusqu'à ce que la personne intéressée soit "legally (i.e., not merely geographically) admitted into the United States".

Dans l'affaire Spann c. le Ministre de la Main-d'oeuvre et de l'immigration (C.A.I., le 5 décembre 1968, non-rapporté) l'appelante, une immigrante reçue, a cherché à entrer aux Etats-Unis, mais a été refusée au poste frontière. Elle est retournée au poste frontière de l'immigration canadienne où un rapport prévu à l'article 23 a été établi, suivi par une enquête supplémentaire qui a amené une ordonnance d'expulsion. La Commission a accueilli son appel. Dans les motifs du jugement signifié par M. J.P. Houle, la Commission a déclaré:

"L'enquête complémentaire prévue à l'article 24(1) n'a lieu que dans les cas de personnes qui cherchent à venir au Canada des Etats-Unis d'Amérique, de l'Alaska ou de Saint-Pierre-et-Miquelon. La question se pose de savoir si l'appelante tombe dans une telle catégorie de personnes? A cette question précise posée par le président audienier, le procureur de l'intimé a répondu:

"This has been a problem with the Department in previous occasions and the Department has had to adopt the position that a person who crosses the International Boundary into the United States has physically left the country. And on their return, if they have been refused by United States Immigration authorities, even though they have technically been at the door knocking, seeking admission to that country and have been denied, they are in effect on their return to Canada seeking to come into this country."

- Chairman: In sort of a limbo?"
- "Mr. Lepitre: they are in sort of a limbo, yes."

Les termes de cette déclaration sont contradictoires; on ne peut à la fois se voir refuser l'admission et être admis. Le passage "physique" sur la limite séparant deux états, ce qui est proprement la définition de frontière, ne saurait, dans l'opinion de la Commission, créer une fiction légale fondant un rapport d'un officier d'immigration en vertu de l'article 23 et la tenue d'une enquête complémentaire sous l'article 24(1) de la Loi sur l'immigration.

En conséquence la Commission arrête que le rapport de l'officier d'immigration, dans l'instance, est non valide et nul et entraîne la non validité et la nullité de l'enquête complémentaire et de l'ordonnance d'expulsion."

Mr. Craddock cited to the Board the case of *Tonner v. Minister of Manpower and Immigration* (Immigration Appeal Board, September 23, 1968, unreported), but in that appeal the Board found it unnecessary to deal with the point at issue in the present appeal.

The Spann case would appear to be almost on all fours with the present appeal. It is true that Mrs. Spann had legal status in Canada - she was a landed immigrant, while Mr. Cardenas has and had at the date of the deportation order, no legal status in this country. However, in determining whether a person seeking to come into Canada from the United States of America, Alaska or Saint-Pierre-et-Miquelon, in respect of Section 24(1) the immigration status of such person in Canada - whether he has or has not legal status in this country - is totally irrelevant. The only question is whether he was ever "in" the countries named, not geographically, but in a legal sense, so as to be said to come "from" such countries to Canada.

In the instant appeal, Mr. Cardenas was refused entry to the United States at the United States border post. He was never "in" the United States in the sense that he could be treated as coming "from" that country within the meaning of section 24(1). On December 6, 1968, he was a person seeking to come into Canada, probably (as suggested by the decision in *Baruch v. Minister of Manpower and Immigration*) technically "from" England, since he was originally legally entered in Canada as a tourist from that country, although it is not necessary to decide this. He therefore fell within the provisions of section 24(2), not section 24(1), of the Immigration Act, and the correct procedure in his case was an inquiry rather than a further examination.

In *De Marigny v. Langlais* (1948) S.C.R. 155, Rand J. said: "In the administration of the Immigration Act, what is to be looked for and

- "Chairman: Is that possible?"

Le procureur de l'intimé fit ensuite référence, sans autre mention, à l'affaire George Christian Hannah mais n'a pas élaboré sur la pertinence de cette affaire au présent appel.

La prétention du procureur de l'intimé, en cette matière, ne résiste pas à l'examen. Il déclare tout d'abord qu'il s'agit d'une position prise par le ministère et le contexte suggère une position prise arbitrairement; à tout le moins le procureur de l'intimé ne donne aucun fondement juridique à cette position.

Retenons bien les termes de sa déclaration:

"a person who crosses the International Boundary into the United States has physically left the country. And on their return, if they have been refused by United States Immigration authorities, even though they have technically been at the door knocking, seeking admission to that country and have been denied..."

Les termes de cette déclaration sont contradictoires; on ne peut à la fois se voir refuser l'admission et être admis. Le passage "physique" sur la limite séparant deux états, ce qui est proprement la définition de frontière, ne saurait, dans l'opinion de la Commission, créer une fiction légale fondant un rapport d'un officier d'immigration en vertu de l'article 23 et la tenue d'une enquête complémentaire sous l'article 24(1) de la Loi sur l'immigration.

En conséquence la Commission arrête que le rapport de l'officier d'immigration, dans l'instance, est non valide et nul et entraîne la non validité et la nullité de l'enquête complémentaire et de l'ordonnance d'expulsion."

M. Craddock a renvoyé la Commission à l'affaire Tonner c. le Ministre de la Main-d'oeuvre et de l'immigration (C.A.I., le 23 septembre 1968, non-rapporté) mais pour le litige dans le présent appel la Commission n'a pas jugé nécessaire d'examiner l'affaire Tonner.

Des quatre précédents, la cause Spann semblerait présenter le plus d'analogies avec le présent appel. Il est vrai que Mme Spann avait un statut légal au Canada, elle était une immigrante reçue, alors que M. Cardenas à la date de l'ordonnance d'expulsion n'avait (et n'a toujours) aucun statut légal. Toutefois quand on détermine si une personne cherche à venir au Canada des Etats-Unis d'Amérique, de l'Alaska

required is a compliance in substance with its provisions ... Samejima v. R. (1932) S.C.R. 640, shows that this Court will not hesitate to condemn 'hugger mugger' proceedings or proceedings in which a defect in substance appears."

The use of a further examination rather than an inquiry in respect of Mr. Cardenas was not compliance in substance with the provisions of the applicable section of the Immigration Act - section 24(2) - it was not compliance at all. It was a fundamental defect in substance, going to the root of the whole proceedings leading up to and flowing from the deportation order. The deportation order made against the appellant on December 6, 1968, is therefore null and void, and the appeal is allowed.

As noted above, the appellant has no legal status in Canada. If the Board had the power to do so, it would be disposed, in the circumstances of this case, to grant the appellant legal status in Canada. The Board is, however a creature of statute, and its only powers in this regard are those set out in section 15 of the Immigration Appeal Board Act which reads in part:

"15(1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (c) of section 14, it shall direct that the order be executed as soon as practicable, except that"-

and here the various grounds for special relief are set out-

"the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made."

The Board can therefore land or enter an appellant, i.e., regularize his status in Canada, if grounds for doing so exist, only if it dismisses an appeal or itself makes a deportation order pursuant to section 14(c) of the Immigration Appeal Board Act. It has no such power if it allows an appeal - a serious lacuna in the Act, which can only be corrected by Parliament.

Appeal allowed.

Concurred in by: Gérard Legaré and U. Benedetti.

For the appellant: D. Braun, Esq. ;
for the respondent: F.D. Craddock, Esq.

ou de Saint-Pierre-et-Miquelon, pour le statut vis-à-vis de l'immigration (aux termes de l'article 24(1)) de la personne au Canada la question de savoir si elle a un statut légal dans ce pays est hors-propos. La seule question pertinente est la suivante: la personne a-t-elle été dans les pays désignés? Cette question doit être posée non pas du point de vue géographique "mais du point de vue de la Loi" afin qu'on puisse dire que la personne vient au Canada des pays mentionnés ci-dessus.

Dans cette instance, M. Cardenas s'est vu refusé l'entrée aux Etats-Unis au poste frontière des Etats-Unis. Il n'est jamais allé "aux" Etats-Unis dans le sens que l'on pourrait considérer, aux termes de l'article 24(1), qu'il venait "de" ce pays. Le 6 décembre 1968, il cherchait à venir au Canada probablement (ainsi que le suggère la décision dans l'affaire Baruch c. le Ministre de la Main-d'oeuvre et de l'immigration), du point de vue technique "d'" Angleterre (from), puisque la première fois qu'il est entré au Canada était à titre de touriste venant d'Angleterre; toutefois il n'est pas nécessaire de statuer sur ce point. En conséquence l'article 24(2) et non 24(1) visait l'appelant et dans cette affaire pour suivre la procédure régulière on aurait dû tenir une enquête (inquiry) et non une enquête supplémentaire (further examination).

Dans l'affaire De Marigny c. Langlais (1918) R.C.S. 155 le juge Rand a déclaré:

"In the administration of the Immigration Act, what is to be looked for and required is a compliance in substance with its provisions ... Samejima v. R. (1932) S.C.R. 640, shows that this Court will not hesitate to condemn 'hugger mugger' proceedings or proceedings in which a defect in substance appears."

Dans cette cause, tenir une enquête supplémentaire au lieu d'une enquête constitue une non conformité aux dispositions de l'article pertinent de la Loi sur l'immigration (article 24(2)), c'est une non-conformité totale. C'est un vice de fond à la base de l'ensemble de la procédure suivie qui a conduit à la signification l'ordonnance d'expulsion. En conséquence l'ordonnance d'expulsion rendue le 6 décembre 1968 contre l'appelant est nulle et non-avenue, subséquemment l'appel est accueilli.

Ainsi que nous l'avons remarqué plus haut, l'appelant n'a pas de statut légal au Canada. Dans cette affaire la Commission serait portée à accorder à l'appelant un statut légal au Canada, si elle avait le pouvoir de le faire. Toutefois, un statut crée la Commission et à

cet égard l'article 15 de la Loi sur la Commission d'appel de l'immigration définit les seuls pouvoirs dont elle dispose. Cet article dit, inter alia:

"15.(1) lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa c) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que - "

et après l'exposition des divers motifs qui justifient un redressement spécial,

"la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement."

En conséquence, si la Commission a des motifs pour le faire, elle peut accorder le droit d'entrée ou de débarquement à un appelant, i.e. régulariser sa situation au Canada, seulement si elle rejette un appel et établit une ordonnance d'expulsion en vertu de l'article 14(c) de la Loi sur la Commission d'appel de l'immigration. Elle ne possède pas ce pouvoir si elle accueille un appel; ceci constitue une lacune sérieuse dans la Loi et seul le Parlement peut remédier à cet état de choses.

Appel accueilli.

Ont souscrit: Gérard Legaré et U. Benedetti.

Pour l'appelant: M. D. Braun;
pour l'intimé: M. F.D. Craddock.

18.

Giuseppe FOLINO et al,

appellants,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: April 23, 1969;

File: 69-21

Coram: Jean-Pierre Houle, U. Benedetti, J.A. Byrne.

Crime - moral turpitude. - Inquiry - change in Special Inquiry Officer during - whether denial of natural justice.- Immigration Act: 5(d), 11(2)(3), 19(2), 70. - Immigration Appeal Board Act: 14(b), 15(1)(a); Juvenile Delinquents Act (R.S.C. 1952, c. 160): 33.

Held: Crime is not defined in the Criminal Code but the Criminal Code is not exhaustive of the criminal law and S. 5(d) of the Immigration Act refers to any crime involving moral turpitude. Contributing to juvenile delinquency is certainly an act or conduct prejudicial to the community, the commission of which by S. 33 of the Juvenile Delinquents Act renders the person liable on summary conviction before a Juvenile Court or a magistrate to fine or to imprisonment or to both; by its inherent nature it is an act of baseness, vileness and depravity in the private and social duties which a man owes to his fellow man or to society in general; it is a crime involving moral turpitude.

An inquiry was commenced and adjourned without the merits of the case having been discussed; adjournment was proper and "rights" of the subject were not affected; there has been no denial of natural justice.

The judgment of the Board was delivered by:

Jean-Pierre Houle:

The order of deportation reads as follows:

- "(1) you are not a Canadian citizen;
- (2) you are not a person having Canadian domicile;
- (3) you are a person described in subparagraph (v) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you have, since your admission to Canada, become a person who, if you were applying for admission to Canada, would be refused admission by reason of your being a member of a prohibited class other than the prohibited classes described in paragraphs (a), (b), (c) and (s) of Section 5, namely, paragraph (d) of Section 5 of the said Act - persons who have been convicted of or admit having committed any crime involving moral turpitude and your admission to Canada has not been authorized by the Governor in Council;

18.

Giuseppe FOLINO et al,

appelants,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 23 avril 1969;

Dossier: 69-21

Coram: Jean-Pierre Houle, U. Benedetti, J.A. Byrne

Crime-turpitude morale.- Enquête - changement d'enquêteur spécial durant - si équivaut à manquement à la justice naturelle.- Loi sur l'immigration: 5(d), 11(2)(3), 19(2), 70; Loi sur la Commission d'Appel de l'Immigration: 14(b), 15(1)(a); loi sur les jeunes délinquants (S.R.C. 1952, c. 160): 33.

Arrêt: Le crime n'est pas défini dans le code criminel mais celui-ci n'est pas exhaustif de la loi pénale et à l'article 5(d) de la Loi sur l'immigration, il est question de tout crime impliquant turpitude morale. Induire un enfant à commettre un délit est, sans aucun doute, avoir une conduite ou commettre un acte qui, selon l'article 33 de la Loi sur les jeunes délinquants, rend son auteur possible, après déclaration sommaire de culpabilité devant une Cour pour jeunes délinquants ou devant un magistrat, d'une amende d'au plus cinq cent dollars ou d'un emprisonnement d'au plus deux ans, ou à la fois de l'amende et de l'emprisonnement, il s'agit d'un acte intrinsèquement mauvais, bas et dépravé qui cause un préjudice grave à un individu ou à la société; c'est un acte impliquant turpitude morale.

Une enquête a été ouverte puis suspendue sans que l'affaire soit discutée au fond; la suspension de l'enquête était justifiée et les "droits" du sujet de l'enquête n'ont pas été touchés: il n'y a pas eu de déni de justice.

Le jugement de la Commission fut rendu par:

Jean-Pierre Houle:

L'ordonnance d'expulsion dit:

"(1) you are not a Canadian citizen;

(2) you are not a person having Canadian domicile;

- (4) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act."

The appellant, aged 33, is a citizen of Italy, married in 1961, and there are two children, Antonio, born in Italy and Filippo, born in Canada on August 3rd, 1966. The son Antonio, aged 5, being an Italian citizen and deemed to be dependent for support upon his father has been included in the order of deportation. The appellant, his wife and son, Antonio, were granted the status of landed immigrants in Canada on March 21st, 1965.

On the 11th day of April 1968, Giuseppe Folino was convicted before a Magistrate for that he the said Giuseppe Folino did between the 15th day of January, 1968, and the 1st day of February 1968, unlawfully, knowingly and wilfully do an act contributing to the delinquency of the child (.....) or likely to make the aforesaid child a juvenile delinquent by engaging in an act of sexual immorality with the aforesaid child; contrary to Section 33 of the Juvenile Delinquents Act. Folino was sentenced to pay the sum of \$300.00 (Copy of certificate of conviction on record). It should be noted here, and for further reference, that Folino had entered a plea of guilty and was represented before the Magistrate by Counsel, Mr. Guy Ungaro.

A report under Section 19 of the Immigration Act was made on 26th day of June 1968 and on same day and in pursuance of Section 26 of aforesaid Act the holding of Inquiry was directed.

The appellant is contesting the legal validity of the order of deportation and his appeal is primarily based upon legal grounds, that there were defects in the hearing leading to the deportation order, that it should not have been made. More specifically, the appellant contends that:

1.- the deportation order itself was not in accordance with the rules of natural justice in that the inquiry was commenced by one Special Inquiry Officer and completed by a second Special Inquiry Officer. By Counsel at pages 20 and 21 of transcript of evidence:

"And I submit that the breaking up of the case into two different immigration officers makes it a clear denial of natural justice. It affects the ability of the officer to assess the credibility of material presented at the previous case before the previous SIO. And notwithstanding the fact it may have matters of little importance, it is very important in this court as in any other court that not only should justice be done, but it should appear to be done, and perhaps justice was done but by breaking up the two immigration officers it does not give the appearance of justice. And it is on that legal ground that I suggest the deportation order should be quashed."

- (3) you are a person described in subparagraph (v) of paragraph (e) of subsection (1) of section 19 of the Immigration Act in that you have, since your admission to Canada, become a person who, if you were applying for admission to Canada, would be refused admission by reason of your being a member of a prohibited class other than the prohibited classes described in paragraphs (a), (b), (c) and (s) of Section 5, namely, paragraph (d) of Section 5 of the said Act - persons who have been convicted of or admit having committed any crime involving moral turpitude and your admission to Canada has not been authorized by the Governor in Council;
- (4) you are subject to deportation in accordance with subsection (2) of section 19 of the Immigration Act.

L'appelant, âgé de 33 ans, est citoyen italien; il s'est marié en 1961 et a deux enfants, Antonio né en Italie et Filippo né le 3 août 1966 au Canada. Le premier fils Antonio âgé de 5 ans est un citoyen italien et semble être à la charge de son père et est donc compris dans l'ordonnance d'expulsion. Le 21 mars 1965, l'appelant, son épouse et son fils Antonio, se sont vus accordés le statut d'immigrant reçu au Canada.

Le 11 avril 1968 M. Giuseppe Folino a comparu devant le juge; il était inculpé d'avoir posé à l'encontre de la Loi, sciemment et volontairement entre le 15 janvier 1968 et le 1^{er} février 1968, un acte qui a contribué à la délinquance de l'enfant (...) ou vraisemblablement à cause des rapports sexuels avec cet enfant a porté ledit enfant à devenir un jeune délinquant; il contrevenait ainsi à l'article 33 de la Loi sur les jeunes délinquents. La Cour a condamné Folino à verser une amende de trois cent dollars (la copie du certificat de condamnation est au dossier). Remarquons ici, que M. Folino a plaidé coupable et qu'il était représenté devant le juge par Me Guy Ungaro.

Le 26 juin 1968 un rapport prévu à l'article 19 de la Loi sur l'immigration était établi et le même jour, conformément à l'article 26 de la Loi, on ordonnait la tenue d'une enquête.

L'appelant conteste la validité et la légalité de l'ordonnance d'expulsion et son appel porte principalement sur des motifs de droit, à savoir des vices ont entaché l'audition qui a conduit à l'ordonnance d'expulsion donc cette dernière n'aurait pas dû être rendue. Plus précisément l'appelant soutient que:

2.- the offence of contributing to juvenile delinquency, even though it does specify an immoral act, does not come under Section 5(d) of the Immigration Act.

"I take issue in the word "crime" and I suggest that the word "crime" should be interpreted as meaning a crime under the Criminal Code. It is well known that a juvenile delinquents act was specially enacted by the Government to provide an alternative to a criminal record for juveniles. It was specifically set up so that juveniles would not be caught under the Criminal Code and thereby be given a criminal record.

Now contributing to juvenile delinquency is one part of that Act and I am suggesting to you that that Act is specifically designed to come away from the Criminal Code, it should not be called a crime within the meaning of Section 5(d). Therefore the appeal should be quashed since 5(d) has no application and Mr. Folino would then not come under any of the provisions of Section 19."

Dealing with appellant's first legal argument: that the order of deportation should be quashed because there has been a denial of natural justice in breaking up the case into two different immigration officers.

On 14th August, 1968, an inquiry concerning Giuseppe Folino was held under the provisions of the Immigration Act by SIO, V.R. Brown at the Immigration Office in Niagara Falls, Ontario, (Minutes of the Inquiry on record). Folino is present and accompanied by his counsel, Mr. Guy Ungaro, Barrister.

At page 2 of the Minutes, one reads: "The purpose of this inquiry is to determine whether you are a person who may be allowed to remain in Canada and in the event a decision is reached that you are not such a person an order shall be made for your deportation from Canada (italics are mine).

"Q. Do you understand why this inquiry is being held?

A. Yes."

Pages 3, 4 to the bottom of page 5, deal with identification of counsel, identification, marital status, address of subject.

Then, starting at bottom of page 5 to page 7 inclusive:

"Q. Have you been convicted of an offence since being admitted to Canada as an immigrant?

A. No."

1. l'ordonnance d'expulsion, en tant que telle, n'a pas été établie en conformité des règles de justice naturelle en ce sens qu'un enquêteur spécial a commencé l'enquête mais qu'un autre l'a clôturée. A la page 20 et 21 de la transcription de la preuve le conseiller a déclaré:

"And I submit that the breaking up of the case into two different immigration officers makes it a clear denial of natural justice. It affects the ability of the officer to assess the credibility of material presented at the previous case before the previous SIO. And notwithstanding the fact it may have matters of little importance, it is very important in this court as in any other court that not only should justice be done, but it should appear to be done, and perhaps justice was done but by breaking up the two immigration officers it does not give the appearance of justice. And it is on that legal ground that I suggest the deportation order should be quashed."

2. l'acte qui contribue à la délinquance d'un enfant, bien que comportant immoralité, ne tombe pas sous le coup de l'article 5(d) de la Loi sur l'immigration.

"I take issue in the word "crime" and I suggest that the word "crime" should be interpreted as meaning a crime under the Criminal Code. It is well known that a juvenile delinquents act was specially enacted by the Government to provide an alternative to a criminal record for juveniles. It was specifically set up so that juveniles would not be caught under the Criminal Code and thereby be given a criminal record.

Now contributing to juvenile delinquency is one part of that Act and I am suggesting to you that that Act is specifically designed to come away from the Criminal Code, it should not be called a crime within the meaning of Section 5(d). Therefore the appeal should be quashed since 5(d) has no application and Mr. Folino would then not come under any of the provisions of Section 19."

Traitons du premier point de droit: l'ordonnance d'expulsion devrait être annulée car il y a eu déni de justice naturelle puisque deux fonctionnaires à l'immigration se sont partagés l'enquête.

By Counsel:

On the understanding that "an offence" is not a criminal offence, the answer is yes.

By Special Inquiry Officer to person concerned:

I refer to attachment 2 to Exhibit 'A' which is a certificate of conviction dated 15 May 1968 at Niagara Falls, Ontario, and signed by Jack Irwin, Court Clerk, which indicates that one Giuseppe Folino of 2551 Ash Street, Niagara Falls, Ontario, was convicted on 11 April 1968 before Magistrate J.L. Roberts -

By Counsel:

It was not Magistrate Roberts, it was Begora.

By Special Inquiry Officer:

- for that the said Giuseppe Folino did between the 15th day of January 1968 and the 1st day of February 1968, at the City of Niagara Falls in the County of Welland unlawfully knowingly and wilfully do an act contributing to the child, to wit: Susan Washburn, or likely; to make the aforesaid child a juvenile delinquent by or engaging in an act of sexual immorality with the aforesaid child. Contrary to the provisions of the Juvenile Delinquents Act. And it was adjudged that the said Giuseppe Folino for his said offence to forfeit and pay the sum of \$300.00 to be paid and applied according to law.

Q. Does this refer to you?

A. No.

By Counsel:

I think I should explain. Although he has admitted to an offence this certificate of conviction is incorrect. For one thing the address is wrong, secondly the Magistrate is incorrect, and the offence itself is not that to which he pleaded guilty. That certificate does not apply, it is incorrect.

By Special Inquiry Officer to Counsel:

Q. Do I understand you correctly Sir, that this certificate of conviction is not a true and correct copy of the actual conviction?

A. That is correct.

Le 14 août 1968 une enquête à l'égard de M. G. Folino a été tenue en vertu des dispositions de la Loi sur l'immigration par l'enquêteur spécial, V.R. Brown dans le bureau de l'immigration à Niagara Falls, Ontario, (procès-verbal de l'enquête au dossier). M. Folino était présent et accompagné par son conseiller, Me Guy Ungaro.

A la page 2 du procès-verbal, nous lisons:

"The purpose of this inquiry is to determine whether you are a person who may be allowed to remain in Canada and in the event a decision is reached that you are not such a person an order shall be made for your deportation from Canada"(nos soulignés)

"Q. Do you understand why this inquiry is being held?

A. Yes."

Des pages 3 et 4 au bas de la page 5 on traite de l'identité du conseiller, de l'identité de l'appelant, de son statut matrimonial, et de son adresse.

Ensuite, du bas de la page 5 a la page 7 (inclusivement):

"Q. Have you been convicted of an offence since being admitted to Canada as an immigrant?

A. No."

By Counsel:

On the understanding that "an offence" is not a criminal offence, the answer is yes.

By Special Inquiry Officer to person concerned:

I refer to attachment 2 to Exhibit 'A' which is a certificate of conviction dated 15 May 1968 at Niagara Falls, Ontario, and signed by Jack Irwin, Court Clerk, which indicates that one Giuseppe Folino of 2551 Ash Street, Niagara Falls, Ontario, was convicted on 11 April 1968 before Magistrate J.L. Roberts -

By Counsel:

It was not Magistrate Roberts, it was Begora.

By Special Inquiry Officer:

-for that the said Giuseppe Folino did between the 15th day of January 1968 and the 1st day of February

- Q. You said your client was not convicted before Magistrate Roberts?
 A. I believe it was Magistrate T.R. Begora, and the conviction did not show the offence stipulated on this, with the act of contributing. I think the safest thing is to get a transcript of the case testimony, that would be the best thing.

By Special Inquiry Officer:

I will adjourn the inquiry and endeavour to obtain a correct, certified true copy of the certificate of conviction. (italics are mine)

(Inquiry adjourned)

(Inquiry resumed)

Counsel to person concerned and Special Inquiry Officer proceeded to the Magistrate's Court, Niagara Falls, where it was learned that the Court Clerk was out of town today, the Magistrate or Magistrates involved were not available as they were both out of town, and the Court Reporter was on annual vacation.

By Special Inquiry Officer to Counsel:

I will adjourn this inquiry until a later date and obtain a certified true copy of the certificate of conviction. Mr. Folino and yourself will be advised of the date on which the inquiry will be resumed. (italics are mine)

By Special Inquiry Officer to person concerned:

I will release you on a bond for conditional release in the amount of \$500.00 in which you will be required to report to this office in person every two weeks commencing 28 August 1968, or as instructed.

(Inquiry adjourned)

It is evident from the reading of those minutes that:

a) an inquiry was commenced and was adjourned; b) adjournment was to obtain a correct, certified true copy of a certificate of conviction, which certificate contributes an essential document in this case. It is my view that adjournment was proper and made pursuant to Section 11(3)(e) of the Immigration Act; "A Special Inquiry Officer may, for the purposes of an inquiry do all other things necessary to provide a full and proper inquiry." Furthermore, it should be stressed that at that stage the merits of the case have not been examined, less discussed, in other words the SIO Brown has started an inquiry but has determined nothing

1968, at the City of Niagara Falls in the County of Welland unlawfully knowingly and wilfully do an act contributing to the child, to wit: Susan Washburn, or likely; to make the aforesaid child a juvenile delinquent by or engaging in an act of sexual immorality with the aforesaid child. Contrary to the provisions of the Juvenile Delinquents Act. And it was adjudged that the said Giuseppe Folino for his said offence to forfeit and pay the sum of \$300.00 to be paid and applied according to law.

Q. Does this refer to you?

A. No.

By Counsel:

I think I should explain. Although he has admitted to an offence this certificate of conviction is incorrect. For one thing the address is wrong, secondly the Magistrate is incorrect, and the offence itself is not that to which he pleaded guilty. That certificate does not apply, it is incorrect.

By Special Inquiry Officer to Counsel:

Q. Do I understand you correctly Sir, that this certificate of conviction is not a true and correct copy of the actual conviction?

A. That is correct.

Q. You said your client was not convicted before Magistrate Roberts?

A. I believe it was Magistrate T.R. Begora, and the conviction did not show the offence stipulated on this, with the act of contributing. I think the safest thing is to get a transcript of the case testimony, that would be the best thing.

By Special Inquiry Officer:

I will adjourn the inquiry and endeavour to obtain a correct, certified true copy of the certificate of conviction. (nous soulignons)

(See Section 11(2) of the Immigration Act); at the time of the adjournment the only things which have been ascertained are the identification of subject and his counsel and the impropriety and incorrectness of a certificate of conviction. The "rights" of the subject were left untouched. In any case a Special Inquiry Officer is not a persona designata and in this instance I fail to see even the shadow of a denial of natural justice when Special Inquiry Officer J.A. Cummings commenced his inquiry on November 1st, 1968. First legal argument of appellant is therefore defeated.

Dealing with second legal argument: the offence of contributing to juvenile delinquency, even though it does specify an immoral act, does not come under Section 5(d) of the Immigration Act, and the appellant would then not come under any of the provisions of Section 19. Section 5(d) reads: "No person shall be admitted to Canada if he is a member of any of the following classes of persons:

Persons who have been convicted of or admit having committed any crime involving moral turpitude ..."

Relevant parts of Section 19 are:

"19.(2) Every person who is found upon an inquiry duly held by a Special Inquiry Officer to be a person described in subsection (1) is subject to deportation".

One has to recall that Folino has pleaded guilty to a charge of contributing to a child's being or becoming a juvenile delinquent or likely to make a child a juvenile delinquent (Section 33 Juvenile Delinquents Act). Now, whether the entering of a plea of guilty has been part of the strategy used by Folino's counsel is irrelevant, here, and it is not for the Board to pronounce on that matter. On file there is a certificate of conviction to the effect that Folino "did knowingly and wilfully do an act contributing to the child (.....) or likely to make the aforesaid child a juvenile delinquent by engaging in an act of sexual immorality with the aforesaid child: contrary to Section 33 of the Juvenile Delinquents Act." And for the said offence Folino had to pay a fine of \$300.00. Therefore the only matter to be determined is: does the offence for which Folino has been convicted constitute a crime involving moral turpitude as per Section 5(d) of the Immigration Act?

Learned counsel for the appellant has argued that the word "crime" should be interpreted as meaning a crime under the Criminal Code. Well, crime is not defined in the Criminal Code but the Criminal Code is not, by any means, exhaustive of the criminal law and Section 5(d) of the Immigration Act refers to any crime involving moral turpitude. The "Concise Law Dictionary" by Osborn defines crime: "A crime may be described as an act, default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings, normally instituted by officers in

By Special Inquiry Officer to Counsel:

I will adjourn this inquiry until a later date and obtain a certified true copy of the certificate of conviction. Mr. Folino and yourself will be advised of the date on which the inquiry will be resumed.
(italics are mine)

By Special Inquiry Officer to person concerned:

I will release you on a bond for conditional release in the amount of \$500.00 in which you will be required to report to this office in person every two weeks commencing 28 August 1968, or as instructed.

(Inquiry adjourned)

A l'examen de ce proces-verbal il apparaît que:

a) une enquête a été ouverte puis ajournée; b) la période d'ajournement devait servir à obtenir la copie certifiée conforme d'un certificat de condamnation; ledit certificat constitue un document de base dans cette affaire. J'estime que l'ajournement était approprié et établi conformément à l'article 11(3)(e) de la Loi sur l'immigration; "un enquêteur spécial... peut aux fins d'une enquête... accomplir toutes autres choses nécessaires pour assurer une enquête complète et régulière". De plus, nous insistons sur ceci: à ce point, le fond de l'affaire n'a pas été examiné, encore moins débattu; en d'autres termes M. Brown, enquêteur spécial, a ouvert une enquête mais n'a rien déterminé (voir l'article 11(2) de la Loi sur l'immigration); à l'époque de l'ajournement les seuls points certains ont trait à l'identité du sujet, à celle de son conseiller, et aux impropriétés et inexactitudes du certificat de condamnation. Aucune atteinte n'a été portée contre les droits du sujet. En tout cas, l'enquêteur spécial n'est pas une persona designata et dans cette instance je ne peux voir même l'ombre d'un déni de justice naturelle lorsque le 1^{er} novembre 1968 M. J.A. Cummings, enquêteur spécial, a commencé son enquête. En conséquence, le premier argument juridique de l'appelant est rejeté.

Traitons du deuxième point de droit: l'acte qui contribue à la délinquance d'un enfant, bien que comportant turpitude morale ne tombe pas sous le coup de l'article 5(d) de la Loi sur l'immigration, et alors l'appelant n'aurait pas dû tomber sous le coup de l'article 19. L'article 5(d) dit: "Nulle personne ... ne doit être admise au Canada si elle est membre de l'une des catégories suivantes:

the service of the Crown". Contributing to juvenile delinquency is certainly an act or conduct prejudicial to the community, the commission of which by Section 33 of the Juvenile Delinquents Act renders the person liable on summary conviction before a Juvenile Court or a magistrate to fine not exceeding five hundred dollars or to imprisonment for a period not exceeding two years or to both fine and imprisonment. Thus, one may conclude that Folino has been convicted of a crime. Is it a crime involving moral turpitude? Learned counsel for the Respondent has cited an abundant jurisprudence but suffice it to say that the Board in numerous cases, has recognized and pronounced that moral turpitude includes everything done contrary to justice, honesty, modesty or good moral; to fall within the category of crime involving moral turpitude an act to be by its inherent nature an act of baseness, vileness, depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

To knowingly and wilfully do an act contributing to a child or likely to make a child a juvenile delinquent by engaging in an act of sexual immorality with the aforesaid child, is doing an act contrary to justice, honesty, modesty and good moral and which by its inherent nature is an act of baseness, vileness and depravity. Therefore, the second legal argument of the appellant is also defeated.

Held: The order of deportation made against Giuseppe Folino is in conformity with the law and the appeal should be dismissed pursuant to Section 14 of the Immigration Appeal Board Act.

The appellant has also pleaded under Section 15 of the Immigration Appeal Board Act and has requested the Board to exercise its discretionary powers.

The appellant is a landed immigrant since 1965 and therefore decision has to be rendered having regard to all the circumstances of his case, in pursuance of Section 15(1)(a) of the Immigration Appeal Board Act.

The appellant, aged 33, is a married man having the whole of his family with him in Canada; by trade he is a bricklayer and a construction labourer and has been steadily employed since his coming to Canada and having the full confidence of his employer; in 1968 the appellant bought a house with a \$4000. down payment and would have now savings in the amount of \$300. or \$400.; appellant has no previous criminal or police record and there is evidence that his family life is a normal one and has not been disrupted or disturbed by the conviction dealt with above.

Evidence shows that it is on his counsel's advice and direction that Folino has entered a plea of guilt in order to avoid a lengthy court trial and that there have been several mitigating circumstances in his case.

Les personnes qui ont été déclarées coupables de quelque crime impliquant turpitude morale..."

La partie pertinente de l'article 19 dit:

"19(2) Quiconque, sur une enquête dûment tenue par un enquêteur spécial, est déclaré une personne décrite au paragraphe (1) devient sujet à expulsion."

On doit se souvenir que M. Folino a plaidé coupable lorsqu'on l'a accusé d'avoir contribué à la délinquance d'un enfant ou d'avoir porté un enfant à devenir un jeune délinquant ou vraisemblablement d'avoir fait d'un enfant un jeune délinquant (article 33 de la Loi sur les jeunes délinquants). Maintenant, déterminer si l'aveu de culpabilité constituait un élément du plan avancé par le conseiller de M. Folino est, ici, hors-propos et ce n'est pas à la Commission de se prononcer sur ce point. Au dossier il y a un certificat de condamnation à l'effet que M. Folino "did knowingly and wilfully do an act contributing to the child (....) or likely to make the aforesaid child a juvenile delinquent by engaging in an act of sexual immorality with the aforesaid child: contrary to Section 33 of the Juvenile Delinquents Act." Et pour ce délit M. Folino a dû verser 300 dollars d'amende. Ainsi le seul point à débattre est: est-ce que le délit pour lequel M. Folino a été condamné constitue un crime comportant turpitude morale aux termes de l'article 5(d) de la Loi sur l'immigration?

Le savant conseiller de l'appelant a soutenu que le mot "crime" doit être interprété comme signifiant crime défini dans le Code pénal. Il est vrai que le mot crime n'est pas défini dans le Code pénal mais en aucune façon le Code pénal n'est exhaustif de la Loi pénale, de plus l'article 5(d) de la Loi sur l'immigration traite de tout crime impliquant turpitude morale. Dans le "Concise Law Dictionary", Osborn définit crime: "A crime may be described as an act, default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment by fine or imprisonment in special proceedings, normally instituted by officers in the service of the Crown". La contribution à la délinquance d'un enfant constitue certainement un acte ou une conduite préjudiciable à la communauté, et, selon l'article 33 de la Loi sur les jeunes délinquants elle rend son auteur passible après une condamnation sommaire devant une cour pour jeunes délinquants ou un magistrat d'une amende d'au plus cinq cents dollars ou d'un emprisonnement pendant au plus deux ans, ou à la fois de l'amende et d'emprisonnement. Ainsi on pourrait conclure que M. Folino a été accusé d'un crime. Est-ce que ce crime implique turpitude morale? Le savant conseiller de l'intimé a apporté devant la Commission de nombreux précédents mais il suffit de dire que la Commission en bien des cas a reconnu et a déclaré que la turpitude

For some reasons unknown to the Board, the Special Inquiry Officer had decided not to include the appellant's wife in the order of deportation although she has admitted at the inquiry that she is dependent on her husband for her support and so is, for that matter, the Canadian born child.

The other son, Italian born, has been included in the order of deportation as being dependent upon his father for his support. To carry on the execution of the order of deportation would mean that the head of the family and one of his sons will be deported to Italy while the other dependents, the wife and a child will be permitted to stay in Canada. True the wife can choose to follow her husband and Section 70 of the Immigration Act provides that "The Minister may direct that costs of transportation from Canada be paid out of moneys appropriated by Parliament in the case of a person who should in the opinion of the Minister, be assisted in leaving Canada in order to avoid separation of a family as for other good cause...". However, is it necessary to underline the fact that there is much more involved here than the defrayal of costs of transportation? And again one should not forget that the appellant, his wife and one of their sons, are landed immigrants; and that there is another son who is a Canadian citizen by birth.

Taking into account all the circumstances of this case, regardless to the legal points, the Board finds reasonable grounds to exercise its discretion.

- Decision: 1) The appeal is dismissed pursuant to Section 14 of the Immigration Appeal Board Act;
- 2) The order of deportation is quashed pursuant to Section 15(1)(a) of aforesaid Act.

Concurred in by: U. Benedetti and J.A. Byrne.

For the appellant: G. Ungaro, Barrister and Solicitor;
for the respondent: Paul Betournay, Barrister and Solicitor.

morale comprend toute chose faite à l'encontre de la justice, ou de l'honnêteté, ou de la pudeur, ou des bonnes moeurs; tout acte intrinsèquement mauvais, bas, qui déprave les obligations que l'homme a vis-à-vis de son prochain et à l'égard de la société, enfin, contraire à la règle coutumière du droit et des obligations parmi les hommes; c'est un acte impliquant turpitude morale.

Sciemment et volontairement avoir posé un acte qui a contribué à la délinquance d'un enfant ou vraisemblablement, à cause des rapports sexuels avec l'enfant, a porté celui-ci à devenir un jeune délinquant constitue un acte qui va à l'encontre de la justice, de l'honnêteté, de la pudeur, des bonnes moeurs; c'est un acte intrinsèquement mauvais, bas, impliquant dépravation. En conséquence, le deuxième argument juridique de l'appelant est aussi rejeté.

Arrêt:

L'ordonnance d'expulsion rendue contre M. G. Folino est en conformité de la Loi et l'appel, devrait être rejeté en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration.

L'appelant a demandé que la Commission examine son cas sous l'article 15 de la Loi sur la Commission d'appel de l'immigration qui confère un pouvoir discrétionnaire à cette Commission.

Depuis 1965 l'appelant est un immigrant reçu; en conséquence, l'établissement de la décision dans cette affaire repose sur l'article 15(a)(1) de la Loi sur la Commission d'appel de l'immigration.

L'appelant est âgé de 33 ans, il est marié et toute sa famille est avec lui au Canada; il exerce le métier de maçon et il est aussi ouvrier en bâtiment; depuis son arrivée au Canada il a travaillé régulièrement et son employeur a entière confiance en lui; en 1968 l'appelant a acheté à tempérament une maison avec un payment initial de quatre mille dollars et, à présent, ses épargnes se monteraient à trois cent ou à quatre cent dollars; auparavant son casier judiciaire était vierge et la preuve est faite qu'il mène une vie de famille normale et que sa condamnation n'a ni brisé ni ébranlé son foyer.

La preuve montre que 1) M. Folino sur les conseils et les directives de son conseiller a plaidé coupable afin d'éviter un long procès. 2) dans cette affaire il y a plusieurs circonstances atténuantes.

Pour des motifs dont la Commission n'a pas connaissance, l'enquêteur spécial a décidé de ne pas comprendre l'épouse de l'appelant dans l'ordonnance d'expulsion, bien que Mme Folino ait admis à l'enquête être, ainsi que leur fils né au Canada, à la charge de M. Folino. L'autre fils, né en Italie, en tant qu'enfant à charge

a été compris dans l'ordonnance. Exécuter l'ordonnance d'expulsion signifierait que le chef de famille et un de ses fils seraient expulsés en Italie, alors que les autres membres de sa famille dont il a la charge, son épouse et l'autre enfant, pourraient rester au Canada. Il est vrai que l'épouse peut décider de suivre son époux et que l'article 70 de la Loi sur l'immigration stipule que: "Le Ministre peut ordonner que les frais de transport du Canada soient acquittés à même les deniers attribués par le Parlement dans le cas d'une personne qui devrait, de l'avis du Ministre, être aidée à quitter le Canada afin d'éviter la séparation d'une famille ou pour tout autre motif valable...". Cependant, est-il nécessaire de souligner que dans cette affaire il ne s'agit pas uniquement de défrayer les frais de transport? Rappelons, encore, que l'appelant, son épouse et un de leur fils sont des immigrants reçus et que l'autre fils est citoyen canadien de naissance.

La Commission, en tenant compte de toutes les circonstances de cette affaire et en oubliant son côté juridique, déclare trouver des motifs raisonnables d'exercer son pouvoir discrétionnaire.

Décision:

1. L'appel est rejeté en vertu de l'article 14 de la Loi sur la Commission d'appel de l'immigration;
2. L'ordonnance d'expulsion est annulée en vertu l'article 15(1)(a) de la Loi sur la Commission d'appel de l'immigration.

Ont souscrit: U. Benedetti et J.A. Byrne.

Pour l'appelant: Me G. Ungaro;
pour l'intimé: Me Paul Betournay.

RESUMES

RÉSUMÉS

19.
 John Stanley MARTIN, appellant,
 v.
 The Minister of Manpower and Immigration, respondent.

Date of the decision: February 23, 1968;
 File: 67-5015.

Coram: Miss J.V. Soctt, Gérard Legaré, A.B. Weselak.

Narcotics conviction - Notice of appellant's right to counsel on eve of Special Inquiry - Deportation order - Appeal barred at the time by Immigration Act - Immigration Appeal Board Act proclaimed - Appeal while still serving sentence. - Appeal valid since none made previously - Insufficient notice of right to counsel - In instant case, no prejudice - Request by respondent's counsel to ignore deportation order not valid. - Exclusive jurisdiction of the Board regarding deportation orders - Obligation to consider order in toto - Exceptions - Reference in Immigration Act to Opium and Narcotic Drugs Act (1952 R.S.C. Ch. 210) - Interpretation Act in force at time of the order authorizes substitution by Narcotics Control Act. - Deportation order valid - Immigration Act: 4, 11, 19(1)(d), 19(1)(e)(iii), 19(1)(4), 29, 30, 31; Immigration Board Act: 7, 11, 14, 22, 29, 33(a); I.A. Bd Act Rules: 4(3); Narcotics Control Act (1960-1) R.S.C. Ch. 35, S. 2(i), 3, 4; Inquiries Act: 13; Interpretation Act: (1967, 16 Eliz. II, c. 7) 20.

Appellant was convicted in January 1967 of trafficking in narcotics (marijuana) contrary to S. 4(1) of the Narcotics Control Act. One day before the special inquiry appellant was served with a notice advising him as to his right to counsel. He was ordered deported under S. 19(1)(d) of the Immigration Act - which refers to the Opium and Narcotics Drugs Act - on March 9, 1967. No Appeal was filed from this order, since such appeal was barred by SS. 30 and 31 of the Immigration Act (subsequently repealed by S. 29 of the Immigration Appeal Board Act). In December 1967, appellant filed an appeal with the Board.

Held: The Board has jurisdiction to hear the appeal as none was made under the new Immigration Appeal Board Act, and as no grounds existed previously under Immigration Act. - Even though insufficient notice was given of appellant's right to counsel, no prejudice was suffered since said appellant waived such right at inquiry. - Counsel has no power to ignore portion of a deportation order even on consent of other party. The Board must deal with all grounds of an order which can only be amended by the Board after a hearing or by Special Inquiry Officer on a properly reopened inquiry. - The Board has exclusive jurisdiction regarding deportation orders and is not bound by provincial courts' decisions -

19.

John Stanley MARTIN,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 23 février 1968;
Dossier: 67-5015.

Coram: Mlle J.V. Scott, Gérard Legaré, A.B. Weselak.

Condamnation en matière de stupéfiants - A la veille de l'enquête, avis du droit de l'appelant de retenir les services d'un procureur - Ordonnance d'expulsion - Aucun motif d'appel à l'époque en vertu de la Loi d'immigration - Loi de la Commission d'appel de l'immigration promulguée - Appel durant emprisonnement. - Appel valide car aucun auparavant - Avis insuffisant du droit de retenir les services d'un procureur - En l'espèce, aucun préjudice. - Requête du procureur de l'intimé de ne pas considérer partie de l'Ordonnance d'expulsion - obligation de considérer l'ensemble de l'ordonnance - Compétence exclusive de la Commission en matière de telles ordonnances - Exceptions - Référence à Loi sur l'immigration, à Loi sur l'opium et les drogues narcotiques (1952, S.R.C., Ch. 201) - Loi d'interprétation en vigueur à l'époque autorise substitution par Loi sur stupéfiants - Ordonnance d'expulsion valide - Loi sur l'immigration: 4, 11, 19(1)(d), 19(1)(e)(iii), 19(1)(4), 29, 30, 31 - Loi sur la Commission d'appel de l'immigration: 7, 11, 14, 22, 29, 33(a); Règlement de la Commission d'appel de l'immigration: 4(3); Loi sur les stupéfiants (1960-1, S.R.C., Ch. 35) 2(i), 3, 4; Loi sur les enquêtes: 13; Loi d'interprétation: (1967, 16 Eliz. II, c. 7) 20. En janvier 1967 l'appelant fut condamné pour avoir fait le trafic de stupéfiants (Marijuana) à l'encontre de l'article 4(1) de la Loi sur les stupéfiants. A la veille de l'enquête spéciale, il reçut avis de son droit de retenir les services d'un conseiller. Une Ordonnance d'expulsion fut émise contre lui le 8 mars, 1967. Aucun appel de cette Ordonnance ne fut déposé, étant donné que les articles 30 et 31 de la Loi de l'immigration (modifiés par la suite par l'article 29 de la loi de la Commission d'appel de l'immigration) l'interdisaient. En décembre 1967, l'appelant déposa un appel auprès de la Commission.

Arrêt: La Commission a compétence pour entendre l'appel puisqu'aucun autre ne fut fait en vertu de son statut et qu'aucun motif n'existait auparavant en vertu de la Loi de l'immigration pour ce faire. - Il n'y a pas eu préjudice en l'espèce, car à l'enquête l'appelant renonça à ce droit - Un procureur ne peut, même avec l'assentiment de l'autre partie, ignorer une partie d'une Ordonnance d'expulsion. La Commission doit étudier tous les éléments de l'Ordonnance qui ne peut être modifiée par elle qu'après l'audition et par l'enquêteur spécial à une réouverture

Under Interpretation Act in force at appropriate time, Narcotics Control Act must be substituted for Opium and Narcotic Drugs Act in reading sec. 19(1)(d) of Immigration Act, since the offence of drug trafficking is the subject matter of both.

Appeal dismissed.-

For the appellant: A.E. Golden, Barrister and Solicitor;
for the respondent: E.M. Thomas, Q.C.

de l'enquête en bonne et due forme. La Commission a juridiction exclusive en matière d'Ordonnance d'expulsion et n'est pas liée par les décisions des cours provinciales - En lisant l'article 19(1)(d) de la Loi sur l'immigration il faut lire, en vertu de la Loi d'interprétation en vigueur alors, Loi sur les stupéfiants pour Loi sur l'opium et les drogues narcotiques, étant donné que ces deux lois traitent du trafic des stupéfiants.-

Pour l'appelant: Me A.E. Golden;
pour l'intimé: Me E.M. Thomas, c.r.

20.
 William A.J. FOULGER, appellant,
 v.

The Minister of Manpower and Immigration, respondent.

Date of the decision: March 19, 1968;
 File: 68-5015.

Coram: Miss J.V. Scott, J.C.A. Campbell, A.B. Weselak.

Landed immigrant - Return to native country for a temporary purpose - Whether abandonment of domicile or status. - Time element. - Minister's permit. - Immigration Act: S. 4(2)(c).-

The appellant, an Australian citizen, and his family were admitted to Canada as landed immigrants in October, 1962. In January, 1964, the appellant and his wife and the two youngest children returned to Australia to sell their home there and to visit the appellant's father. The two older children remained in Canada. In July, 1967, the appellant sought to return to Canada, but the Canadian Immigration Office refused to recognize him as a landed immigrant, and new applications for landed immigrant status were filed. In September, 1967, a Minister's Permit was issued, valid for one month, to permit the appellant and his family to attend the wedding of his daughter in Canada.

The appellant failed to leave Canada on the expiration of the period designated by the permit and in November, 1967, a Section 19 Report was issued on the grounds of Section 19(1)(e)(vi) of the Immigration Act. - After an Inquiry a deportation order on the same ground was made in December, 1967. No deportation order was made in respect of the appellant's wife or younger children, although the same circumstances applied to them.

Held: The return of a person with landed immigrant status to his native country for a temporary purpose does not constitute an abandonment of his place of domicile or status as an immigrant. - For the purpose of acquiring Canadian domicile time continues to run even while such person is away for temporary purposes. In this appeal, the appellant was domiciled in Canada before the Section 19 Report was issued. - The issuance of a Minister's Permit does not in the circumstances supersede the landed immigrant status previously acquired. It is a nullity. It does not affect the acquisition of domicile as provided under Section 4(2)(c) of the Act. - Appeal allowed.

For the appellant: J.A.W. Drysdale, Barrister and Solicitor;
 for the respondent: E.M. Thomas, Q.C.

20.

William A.J. FOULGER,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: 1e 19 mars 1968;

Dossier: 68-5015

Coram: Mlle J.V. Scott, J.C.A. Campbell, A.B. Weselak

Immigrant reçu - Retour momentané au pays d'origine - Abandon de domicile ou d'état - Le facteur temps. - Emission d'un permis par le Ministre - Loi de l'immigration: 4(2)(c).

En octobre 1962 l'appelant, citoyen d'Australie, et sa famille, furent admis au Canada, à titre d'immigrants reçus. En janvier 1964, l'appelant, sa femme et deux jeunes enfants retournèrent en Australie pour y vendre leur propriété et rendre visite au père de l'appelant. Deux autres enfants, aînés des précédents, demeurèrent au Canada. En juillet 1967, l'appelant tenta de revenir au Canada mais le fonctionnaire à l'immigration refusa de le reconnaître comme immigrant reçu. De nouvelles demandes de résidence permanente furent faites. - En septembre 1967, le Ministre émit un permis, valide pour un mois, autorisant l'appelant et sa famille à assister au mariage, au Canada, de leur fille.- l'appelant ne quitta pas le Canada à l'expiration de son permis de séjour et, en novembre 1967, un rapport en vertu de l'article 19 et fondé sur les dispositions de l'article 19(1)(e)(vi) de la Loi de l'immigration fut établi.- Après l'enquête, une Ordonnance d'expulsion s'appuyant sur les mêmes dispositions, fut émise.- Il n'y eut pas d'Ordonnance d'expulsion contre l'épouse et les jeunes enfants de l'appelant.

Arrêt:- Le retour momentané d'un immigrant reçu dans son pays d'origine n'emporte pas abandon de son lieu de domicile ni de son statut. Aux fins d'obtenir le domicile canadien, le délai court même si la personne s'absente momentanément. Dans cette affaire l'appelant était domicilié au Canada avant que ne soit émis le rapport prévu par l'article 19.- Le permis du Ministre n'efface pas, dans les circonstances, le statut d'immigrant déjà acquis. Ce permis est de nul effet et est sans portée sur l'acquisition du domicile que prévoit l'article 4(2)(c) de la Loi sur l'immigration. Appel accueilli.

Pour l'appelant: Me J.A.W. Drysdale;
pour l'intimé: Me E.M. Thomas, c.r.

21.
 Donald Edwin MOORE, appellant,
 v.
 The Minister of Manpower and Immigration, respondent,

Date of the decision: April 9, 1968;
 File: 68-5078.

Coram: A.B. Weselak, Miss J.V. Scott, J.C.A. Campbell

Person who "resides or may be" in Canada - The place where a person is to be deported is not part of a deportation order, and the Board has no jurisdiction in this regard. - Matters which precede the making of the order and the order as such only to be considered by the Board.- Crime outside Canada involving moral turpitude: foreign law and Canadian law.- Presumption. - onus of proof. - Moral turpitude: definition. Immigration Act: 5(d); 19(1)(e)(ix); 26.

The appellant, an American citizen, was ordered deported under Section 5(d) and Section 19(1)(e)(ix). Evidence was produced showing some 49 convictions in the United States, including theft. The appellant was detained for an inquiry when he was on the point of departure from Canada for his home in Panama.

Held: Section 19(1) refers to a person who "resides or may be" in Canada. As the appellant was physically in Canada when he was detained for the inquiry, and as the inquiry was properly convened in accordance with Section 19 and Section 26, the Special Inquiry Officer was fully clothed with jurisdiction to hold the inquiry.

The place where a person is to be deported is not part of a deportation order, and the Board has no jurisdiction in this regard. On an appeal from a deportation order the Board can only consider matters which precede the making of the order and the order as such.

In considering whether a foreign conviction relates to a "crime involving moral turpitude" the presumption that foreign law is the same as Canadian law, unless proof of the contrary is adduced, must be applied. The crime, however, must be recognizable as a crime in Canada, i.e. it must be identifiable as one of the crimes defined in the Criminal Code or other Canadian Criminal Statute. If it is not, the onus is on the party alleging the crime, - the Minister - to prove that it is such. If it is, the onus is on the party seeking to disprove its criminal nature- the appellant - to prove the foreign law as a fact. If the appellant fails to satisfy this onus, the presumption applies.

21.

Donald Edwin MOORE,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 9 avril 1968;

Dossier: 68-5078.

Coram: A.B. Weselak, Mlle J.V. Scott, J.C.A. Campbell

Personne qui demeure ou peut être au Canada.- L'endroit où une personne doit être déportée ne fait pas partie de l'Ordonnance d'expulsion et la Commission n'a pas compétence en cette matière.- La Commission ne considérera que les circonstances pertinentes à l'Ordonnance et l'Ordonnance elle-même.- Crime à l'étranger, impliquant turpitude morale: loi étrangère et loi canadienne - Présomption - Fardeau de la preuve.- Turpitude morale: définition. - Loi sur l'immigration: 5(d); 19(1)(e)(ix), 26.- Une ordonnance d'expulsion fut émise en vertu des articles 5(d) et 19(1)(e)(ix) de la Loi sur l'immigration contre l'appellant, un citoyen américain. En preuve: quelques 49 condamnations aux Etats-Unis, dont une pour vol. L'appellant fut détenu pour une enquête alors qu'il était sur le point de quitter le Canada pour aller chez lui au Panama.

Arrêt: L'article 19(1) vise une personne qui "demeure ou peut être" au Canada. Etant donné que l'appellant était établie physiquement au Canada lorsqu'il fut détenu aux fins de l'enquête, et que celle-ci fut selon les articles 19 et 26, l'enquêteur spécial avait toute la juridiction nécessaire pour tenir une enquête.

L'endroit où une personne doit être déportée ne fait pas partie de l'ordonnance d'expulsion et la Commission n'a aucune compétence en la matière. Lors d'un appel la Commission ne peut considérer que les faits qui ont précédé l'émission de l'ordonnance d'expulsion et l'ordonnance comme telle.

En jugeant si une condamnation rendue en dehors du pays a trait à "un crime comprenant turpitude morale", on doit présumer que la Loi étrangère est la même que la loi canadienne, à moins qu'on prouve le contraire. Le crime, cependant, doit être reconnu au Canada comme un crime i.e. l'un des crimes qui tombent sous le Code pénal ou sous d'autres lois pénales canadiennes. S'il ne s'agit d'un tel crime, le fardeau de la preuve qu'il est un crime impliquant turpitude morale appartient à qui porte l'accusation - le ministère; au cas contraire, il appartient à qui cherche à se disculper - l'appellant - de prouver qu'il ne s'agit pas d'un crime impliquant turpitude morale, et ce, en prouvant la loi étrangère. Si l'appellant faillit à cette tâche, la présomption joue contre lui.

"Moral turpitude" is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rules of right and duty between man and man. It must be determined according to Canadian standards. Theft is a crime involving moral turpitude.

Appeal dismissed.-

Appeal to the Supreme Court of Canada: dismissed ...

For the appellant: L.D. Silver, A.C. Bazos, Barristers and Solicitors;
for the respondent: N.M. Thurm, Barrister and Solicitor.

La "turpitude morale" est un acte de bassesse, de lâcheté ou de dépravations dans les devoirs privés et sociaux qu'un homme doit à ses concitoyens ou à la société en général, et contraire aux lois habituelles et acceptées des droits et devoirs de l'homme envers l'homme. Elle doit être déterminée selon les normes canadiennes. Le vol est un crime impliquant la turpitude morale.

Appel rejeté.-

Dont appel à la Cour suprême du Canada: rejeté.-

Pour l'appelant: Mes L.D. Silver et A.C. Bazos;

pour l'intimé: Me N.M. Thurm.

22.

Hilaire Omer PILLE,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: November 21, 1968;
File: 68-5031.

Coram: A.B. Weselak, Gérard Legaré, J.A. Byrne

Deportation order on December 28, 1967 - Appeal filed same day - Inquiry reopened by Department - Additional ground added to order - Notice of appeal. - Appeal completed December 28 - Thus, the Board had whole jurisdiction on res and person of appellant - Amended order and subsequent proceedings a nullity. Original order valid - Immigration Act: 5(d); Regulations: 23, 28(1), 29(1), 34(3)(e).

Pursuant to a Section 23 report on the appellant, an inquiry was held on December 28, 1967, and a deportation order issued. The same day, appeal papers were filed and served. After due notice the Department reopened the inquiry on June 5; and additional ground was added to the order. Notice of appeal was filed and served.

Held: Appeal proceedings were fully completed as of December 28, giving the Board whole jurisdiction over the res and the person of the appellant. Section 29 of the Immigration Act, empowering a Special Inquiry Officer to reopen an Inquiry, is subject to the Immigration Appeal Board Act, a later statute, which divests the Special Inquiry Officer of any jurisdiction in the res once an appeal has been filed and served, and therefore, having been divested of jurisdiction, he had no authority to reopen the Inquiry. Thus, the amended order and proceedings subsequent to December 28 are null and void. The original order is valid.

Appeal dismissed.

For the appellant Me P. Thompson;
for the respondent: J. Gilliland.

22.

Hilaire Omer PILLE,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration

intimé.

Date de la décision: le 21 novembre 1968;

Dossier: 68-5031.

Coram: A.B. Weselak, Gérard Legaré, J.A. Byrne

Ordonnance d'expulsion le 28 décembre 1967 - Appel mis au dossier le même jour - Réouverture d'enquête par le ministre - Motif additionnel à l'ordonnance - Avis d'appel. - Inscription en appel complétée le 28 décembre - Dès lors la Commission avait compétence au fond et à la personne de l'appellant - L'ordonnance amendée et procédures subséquentes nulles et non avenues - Première ordonnance valide - Loi sur l'immigration: 5(d); Règlement: 23, 28(1), 29(1), 34(3)(e).

Suite à un rapport en vertu de l'article 23, une enquête sur l'appellant eut lieu le 28 décembre 1967 et une ordonnance d'expulsion fut émise. Le même jour, des documents d'appel furent déposés et signifiés. Après avis, le Ministre réouvrit l'enquête le 5 juin; un motif additionnel fut ajouté à l'ordonnance. Un avis d'appel fut déposé et signifié.

Arrêt: L'inscription en appel fut complétée le 28 décembre, ce qui, dès lors, donnait compétence à la Commission au fond et à la personne de l'appellant. L'article 29 de la Loi sur l'immigration permet à l'enquêteur spécial de réouvrir une enquête et se lit avec la Loi sur la Commission d'appel de l'immigration, une loi postérieure qui retire à l'enquêteur spécial sa compétence quant au fond, une fois l'appel déposé et signifié, ce qui l'empêche donc de réouvrir l'enquête. Donc, l'ordonnance révisée et les procédures suivies après le 28 décembre sont nulles et non avenues. La première ordonnance est valide.

Appel rejeté.

Pour l'appellant: Me P. Thompson;

pour l'intimé: J. Gilliland.

23.

Francis Ian TONNER,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: September 23, 1968;

File: 68-5474.

Coram: J.C.A. Campbell, Gérard Legaré, J.A. Byrne

"Not entering from the United States". - Domicile: animus reliquendi.-
 Immigration Act: 3(2); 4; 24(1); 27(1)(2).-

Appellant, a U.S. citizen, entered Canada 15 August 1947 as a landed immigrant. He worked in Toronto until November 1958 at which time he was transferred to Cleveland. He stayed there, holding U.S. immigrant status, until March 1960. At that time he went to Boston, working for General Electric, and later running his own company, where he stayed until December of 1966. On his return to Canada in March of 1967 he spoke to Customs, but not to an Immigration officer. On the 13th of June, 1967 he attempted to enter the United States but was refused entry, whereupon he returned to Canada. At that time an inquiry was held and an order of deportation made. Evidence before the Board showed that the appellant had maintained a house in Toronto while in the United States, as well as a bank account. He had visited Canada often, and stated that he had no intention to settle in the U.S. He had however been married in the United States to a citizen of that country, and had partially completed a course at Harvard. The record also showed that he had been convicted of a Narcotic offence in the United States. For the appellant it was stated: (1) that the appellant had Canadian domicile, pursuant to Section 4, and therefore, had a right to enter Canada, pursuant to Section 3(2); (2) the appellant on 13 June 1968 had never left Canada, and therefore, the Special Inquiry Officer had no jurisdiction under Section 24(1), as the appellant was not entering from the United States; (3) if the appellant had lost Canadian domicile, Sections 27(1) and (2) do not apply.

Held: Abandonment of an acquired domicile to be effective must be complete. There must be an animus reliquendi. On the whole of the evidence in this case, the appellant had acquired a Canadian domicile, and had not abandoned it. Appeal allowed.-

For the appellant: G.P. Killeen, Barrister and Solicitor;
 for the respondent: N.M. Thurm, Barrister and Solicitor.

23.

Francis Ian TONNER,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 23 septembre 1968;
Dossier: 68-5474

Coram: J.C.A. Campbell, Gérard Legaré, J.A. Byrne

"Ne venant pas des Etats-Unis" - Domicile: animus relinquendi. - Loi sur l'immigration: 3(2); 4; 24(1); 27(1)(2).-

L'appelant, un citoyen américain est entré au Canada le 15 août 1947 comme immigrant reçu. Il travailla à Toronto jusqu'en novembre 1958, ensuite il fut transféré à Cleveland. Il y resta, détenant le statut d'immigrant aux Etats-Unis, jusqu'en mars 1960. Il est allé ensuite demeurer à Boston jusqu'en décembre 1966 où il travailla pour la Cie General Electric et ensuite établit sa propre compagnie. Lors de son retour au Canada en mars 1967, il s'est adressé aux douanes, mais non pas à un fonctionnaire à l'immigration. Le 13 juin 1967 il essaya d'entrer aux Etats-Unis, mais on lui refusa l'entrée; alors il revint au Canada. Une enquête fut tenue et une ordonnance d'expulsion fut émise contre lui. La preuve devant la Commission démontre qu'alors que l'appelant se trouvait aux Etats-Unis il maintenait une maison à Toronto, ainsi qu'un compte de banque. Il venait souvent au Canada en visite et il déclara qu'il n'avait nullement l'intention de s'établir aux Etats-Unis. Toutefois, il s'était marié aux Etats-Unis à une citoyenne de ce pays et avait partiellement complété un cours à l'Université Harvard. Le dossier indiquait aussi qu'il avait été trouvé coupable aux Etats-Unis d'une infraction en matière de narcotiques. L'appelant alléguait (1) qu'il avait un domicile canadien, en vertu de l'article 4, et avait par conséquent le droit d'entrer au Canada, en vertu de l'article 3(2) de la Loi sur l'immigration; (2) que le 13 juin 1968, il n'avait jamais quitté le Canada, et par conséquent, l'enquêteur spécial n'avait aucune compétence en vertu de l'article 24(1), étant donné que l'appelant n'entrait pas au Canada, en provenance des Etats-Unis; (3) s'il avait perdu son domicile canadien les articles 27(1) et (2) ne s'appliquent pas.

Arrêt: L'abandon d'un domicile acquis, pour être effectif, doit être total. Il doit y avoir un animus relinquendi. En considérant toute la preuve dans cette affaire on doit conclure que l'appelant a acquis un domicile canadien et ne l'avait pas abandonné. Appel accueilli.

Pour l'appelant: Me G.P. Killeen;
pour l'intimé: Me N.M. Thurm.

24.
Moshed GOLDENBERG et al, appellants,

v.

The Minister of Manpower and Immigration, respondent.

Date of the decision: January 6, 1969;
File: 68-5450.

Coram: Jean-Paul Geoffroy, A.B. Weselak, U. Benedetti.

Application for permanent residence - Employment taken without permission-
No remuneration - "employment" in ordinary sense contemplates both work
and price - Immigration Act S. 5(t); Regulations; 34(3)(3); Civil Code:
1602 - de la Province de Québec.

The appellant, a specialist in the treatment of textiles and leather,
arrived in Canada, with his wife, October 18, 1967, and the allowed
period of stay was extended to December 21, 1967. - During the required
period he applied for permanent residence but was refused as he had not
obtained prior written authorization from immigration officials for a
non-remunerated position he was occupying.

Held: The word "employment" in S. 34(3)(e) not being defined must be
treated as being used in its ordinary sense: it contemplates both work
and price. Vide Civil Code, S. 1602. The non-remunerated employment
was only taken to prove his skill. Therefore, the appellant was not
employed.- Both appeals allowed.

For the appellants: M. Berger, Q.C.;
for the respondent: Jacques Pépin, Esq.

24.

Moshed GOLDENBERG et al,

appelants,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 6 janvier 1969;

Dossier: 68-5450

Coram: Jean-Paul Geoffroy, A.B. Weselak, U. Benedetti.

Demande de résidence permanente - Emploi accepté sans permission -
 Aucun paiement accepté - "emploi" dans son sens ordinaire comprend
 travail et prix - Loi sur l'immigration: 5(t); Règlements: 34(3)(e);
 Code Civil de la Province de Québec: 1602.

L'appelant, un spécialiste dans le traitement des textiles et du cuir,
 est entré au Canada avec son épouse le 18 octobre 1967 pour une période
 qui, après extension se terminait le 21 décembre 1967. Dans les délais
 permis, il fit une demande de résidence permanente qui lui fut refusée
 parce qu'il aurait, sans permission écrite et préalable des fonctionnaires
 à l'immigration, obtenu un emploi non rémunéré.

Arrêt: Le mot "emploi" dans l'article 34(3)(e) n'étant pas défini doit
 être considéré et pris dans son sens ordinaire: il comprend travail
 et prix. Vide Code civil: art. 1602. Il a travaillé sans rémunération
 seulement pour démontrer ses titres à sa profession. Par conséquent,
 l'appelant n'a pas été employé.- Les deux appels sont accueillis.

Pour les appelants: Me M. Berger, c.r.;
 pour l'intimé: M. Jacques Pépin.

25.
Georgios SELINIOTAKIS (PLAKAS), appellant,

v.

The Minister of Manpower and Immigration, respondent,

Date of the decision: February 6, 1969;
File: 68-6122.

Coram: Miss J.V. Scott, Jean-Paul Geoffroy, Gérard Legaré.

Change of name - Whether false information "by reason of which appellant entered or remained in Canada". - Proof to support ground of deportation - Whether admissible at hearing of appeal. - Immigration Act: s. 19(1)(e) (viii).

The appellant, a nineteen year old citizen of Greece, unmarried arrived in Canada in June or July 1967 as a member of the crew of a ship. He remained in Montreal, obtained employment, and was arrested on September 26, 1968. An inquiry was held on October 28, 1968, resulting in a deportation order. He testified at the inquiry that where he first arrived he used the name "Georgios Plakas" for a short time.

Held: The evidence did not support either substantial ground of the deportation order; the appellant had neither entered or remained in Canada by reason of false or misleading information i.e. the use of the name Plakas. Further, there was no proof of the departure of appellant's ship, a vital ingredient of S. 19(1)(e)(x) of the Immigration Act. The Minister cannot introduce evidence at the hearing of the appeal in an endeavour to prove a fact necessary to support a ground of deportation.

Appeal allowed.-

For the appellant: A.J. Marcovitch, advocate,
for the respondent: Alain Nadon, advocate.

25.

Georgios SELINIOTAKIS (PLAKAS),

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 6 février 1969;

Dossier: 68-6122.

Coram: Mlle J.V. Scott, Jean-Paul Geoffroy, Gérard Legaré.

Changement de nom. - S'agit-il d'un renseignement faux "à la suite duquel l'appelant est entré ou demeuré au Canada"? - Preuve à l'appui d'un motif d'expulsion - Si admissible à l'audition de l'appel. - Loi sur l'immigration: 19(1)(e)(viii).

L'appelant est un citoyen grec célibataire, âgé de 19 ans, arrivé au Canada au cours des mois de juin ou juillet 1967, comme membre de l'équipage d'un navire. Il demeura au Canada, obtint un emploi, et fut arrêté le 26 septembre 1968. Il y eut une enquête le 28 octobre 1968 et une Ordonnance d'expulsion fut émise. Il déclara à l'enquête que pendant une courte période de temps après son arrivée il utilisa le nom "Georgios Plakas".

Arrêt: L'un ou l'autre motif majeur de l'Ordonnance d'expulsion, n'est pas fondé; l'appelant n'est ni entré ni demeuré au Canada "par suite" d'un renseignement faux ou trompeur i.e. l'usage du nom Plakas. De plus, il manque un élément essentiel de l'article 19(1)(e)(x) de la Loi sur l'immigration, i.e. la preuve du départ du navire de l'appelant. A l'audition de l'appel, le Ministre ne peut présenter une preuve pour tenter d'établir un fait nécessaire pour fonder un motif de l'ordonnance d'expulsion. Appel accueilli. -

Pour l'appelant: Me A.J. Marcovitch;

pour l'intimé: Me Alain Nadon.

26.

Marie-Thérèse FOUCHÉ,

appellant,

v.

The Minister of Manpower and Immigration,

respondent.

Date of the decision: March 12, 1969;

File: 68-6125.

Coram: Jean-Pierre Houle, Jean-Paul Geoffroy, Gérard Legaré.

Border - whether one has left a country if not admitted to another country - whether ground of appeal valid after unsuccessful attempt to leave country - Immigration Act: 5(t); Immigration Regulations: 28(2), 34(3).

Appellant, a Haitian citizen, was admitted to Canada December 19, 1964. After an extension of her stay, she obtained a change in her status to that of student, till July 1966. She left for the U.S.A. in May 1966, remained as a permanent resident for a month, returned to Canada, took up employment, returned to the U.S.A. in February 1968, returned to her job in Canada soon after, and made application for permanent residence on March 22, 1968. It was refused and she was asked to leave by April 5th. She was rejected at the U.S.A. border and returned to Canada. Appeal dismissed.

Held: A person not legally admitted to another country has never left Canada. Thus, prior to April 2nd, the appellant was employed contrary to the Immigration Regulations. The order is valid. Appeal dismissed.

For the appellant: M. Berger, Q.C.;
for the respondent: Michel Babin, advocate.

26.

Marie-Thérèse FOUCHÉ

appelante,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 12 mars 1969;

Dossier: 68-6125.

Coram: Jean-Pierre Houle, Jean-Paul Geoffroy, Gérard Legaré

Frontière - une personne a-t-elle quitté un pays si elle n'a pas été admise ailleurs? - motif appel est-il valide suite à départ échoué? - Loi sur l'immigration: 5(t); Règlement de l'immigration: 28(2), 34(3).

L'appelante, une haïtienne, fut admise au Canada le 19 décembre 1964. Après prolongation de son séjour, elle obtint le changement de son état de visiteur pour celui d'étudiante jusqu'en juillet 1966. Elle alla demeurer, en mai 1966, en qualité de résidente permanente aux E.U., revint au Canada, obtint un emploi, retourna au E.U. en février 1968, quelques jours après repris son emploi, et fit une demande de résidence permanente le 22 mars 1968. Ceci lui fut refusé et on l'invita à quitter le pays avant le 5 avril. L'immigration américaine la refoula au Canada.

Arrêt: Une personne qui n'est pas admise légalement dans un autre pays, n'a jamais quitté le Canada. Donc, avant le 2 avril, l'appelante obtint un emploi à l'encontre des règlements de l'immigration. L'Ordonnance est valide.

Pour l'appelante: Me M. Berger, c.r.
pour l'intimé: Me Michel Babin.

27.

Catherina Wilhelmina Louisa WITTKAMPER,

appellant,

v.

The Minister of Manpower and Immigration,

Date of the decision: May 6, 1969;

File: 69-197

Coram: J.C.A. Campbell, F. Glogowski, U. Benedetti

Acquisition of Canadian domicile as a child - return to homeland with mother - return to Canada later - deported order under S. 19(1)(e)(iii) - No proof of intention to permanently reside outside Canada - admissibility under S. 4(3)(c) - Immigration Act: 4(3)(c), 19(1)(e)(iii).

Appellant, a twenty-one year old citizen of the Netherlands, acquired Canadian domicile in 1952. She returned as a minor to her homeland in 1962 with her mother, only to return to Canada in 1967 as a landed immigrant. She was ordered deported under S. 19(1)(e)(iii) after a 1968 conviction.

Held: The appellant is a person falling within section 4(3)(c) of the Immigration Act. The evidence does not disclose that the appellant resided outside Canada with the intention of making her permanent home out of Canada. As a minor she was incapable of forming the intent necessary to voluntarily reside out of Canada.

Appeal allowed.

For the appellant: I. Waddell, Barrister and Solicitor;
for the respondent: Gilles Labelle, Esq.

27.

Catherina Wilhelmina Louisa WITTKAMPER,

appelante,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 6 mai 1969;

Dossier: 69-197.

Coram: J.C.A. Campbell, F. Glogowski, U. Benedetti.

Acquisition du domicile canadien par un enfant - retour à la mère-patrie avec sa mère - retour au Canada plus tard - ordonnance d'expulsion en vertu de l'article 19(1)(e)(iii) - aucune preuve de l'intention de résider en permanence hors du Canada - Admissibilité en vertu de l'article 4(3)(c) - Loi sur l'immigration: 4(3)(c), 19(1)(e)(iii).

L'appelante, une citoyenne de Hollande, âgée de vingt et un ans a acquis un domicile canadien en 1952. Mineure, elle retourna dans sa mère-patrie en 1962 avec sa mère mais revint au Canada en 1967 à titre d'immigrant. Suite à une condamnation en 1968, une ordonnance d'expulsion a été émise contre elle en vertu de l'article 19(1)(e)(iii).

Arrêt: L'appelante se classe parmi les personnes mentionnées à l'article 4(3)(c) de la Loi sur l'immigration. Il n'y a aucune preuve qu'elle ait voulu résider hors du Canada en permanence. Une mineure ne pouvait, seule, former l'intention de résider à l'extérieure du pays.

Appel accueilli.

Pour l'appelante: Me I. Waddell;
pour l'intimé: Me Gilles Labelle.

28.
 Martin Wayne MORLEY, appellant,
 v.
 The Minister of Manpower and Immigration, respondent.

Date of the decision: May 16, 1969;
 File: 69-336

Coram: A.B. Weselak, Jean-Pierre Houle, J.A. Byrne.

Special Inquiry Officer - power to include grounds in deportation order, not set out in a S. 23 report.- Statement that "Counsel" may include non-lawyers - whether denial of natural justice. - Immigration Act: 23, 28.-

The appellant entered Canada from the United States and applied for permanent residence. He failed on his assessment and was ordered to leave the country, but did not so. The Section 23 report was made, naming Section 5(t) of the Immigration Act, and Sections 34(3)(f), 28(2) and 29(1) of the Immigration Regulations. An inquiry was convened, and a further ground of deportation based on Section 34(3)(b) of the Regulations was added.

Held: The Board finds that the wording of Section 28 does not restrict the findings of the Special Inquiry Officer to the grounds set out in the Section 23 Report, but extends the power of the Special Inquiry Officer to include other grounds proven by evidence.- A statement by a Special Inquiry Officer that the person concerned is entitled to legal counsel, but that the word "counsel" also includes persons who were not lawyers, is in accordance with the demands of natural justice. So long as the person is told of his right to counsel, any additional information is surplusage.

Appeal dismissed.

For the appellant: M. Berger, Q.C.;
 for the respondent: Gilles Labelle, Esq.

28.

Martin Wayne MORLEY,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 16 mai 1969;
Dossier; 69-336

Coram: A.B. Weselak, Jean-Pierre Houle, J.A. Byrne

Enquêteur spécial - pouvoir d'inclure dans une ordonnance d'expulsion des motifs non inclus dans un rapport prévu à l'article 23. - Déclaration que "conseiller" peut s'entendre de personnes qui ne sont pas avocats - y a-t-il déni de justice? - Loi sur l'immigration: 23; 28.-

Des Etats-Unis l'appelant est entré au Canada et formula une demande de résidence permanente. Il faillit aux normes d'appréciations et une ordonnance d'expulsion fut émise, mais l'appelant refusa d'obtempérer. Un rapport prévu à l'article 23 fut établi et appuyé sur l'article 5(t) de la Loi d'immigration et sur les articles 34(3)(f); 28(2) et 29(1) du Règlement de l'immigration. Une enquête a été tenue et un motif additionnel d'expulsion, appuyé sur l'article 34(3)(b) du Règlement, fut inclus dans l'ordonnance.

Arrêt: La Commission est d'avis que le texte de l'article 28 ne limite pas le pouvoir de l'enquêteur spécial d'inclure des motifs d'expulsion (pourvu qu'ils soient en preuve) à ceux contenus dans le rapport prévu à l'article 23. Une déclaration par l'enquêteur spécial que le sujet de l'enquête a droit à un conseil juridique mais que le mot "conseil" s'entend aussi de personnes qui ne sont pas des avocats, satisfait aux exigences de la justice naturelle. Pourvu que le sujet soit informé de son droit à ministère de conseiller, tous autres renseignements sont superfétatoires.

Appel rejeté-

Pour l'appelant: Me M. Berger, c.r.;
pour l'intimé: M. Gilles Labelle.

29.
John DOUCE, appellant,
v.
The Minister of Manpower and Immigration, respondent.

Date of the decision: June 2, 1969;
File: 69-178

Coram: A. B. Weselak, Miss J.V. Scott, Gérard Legaré.

Assessment - Intended occupation not shown on application - Assessment manifestly wrong - Immigration Regulations: 34(3)(f), Schedule A.-

The appellant arrived in Canada April 26, 1968, and the allowed period of stay was extended to June 20, 1968. - On June 5, 1968, the appellant made application for permanent residence, but received only 30 units on his assessment, the application being refused. The appellant had not filled in the space provided for intended occupation on his application. The appellant was said to be a painter, but no other details were given.

Held: No valid assessment could be made pursuant to S. 1(c), 1(d) and 1(i) of Schedule A to the Immigration Regulations without the necessary information. From a lack of information, the assessing officer had made a manifestly wrong conclusion.- Appeal allowed.

For the appellant: José Raphaël, Esq.;
for the respondent: F.D. Craddock, Esq.

29.

John DOUCE,

appellant,

c.

Le Ministre de la Main-d'oeuvre et de l'Immigration,

intimé.

Date de la décision: le 2 juin 1969;
Dossier: 69-178.

Coram: A.B. Weselak, Mlle J.V. Scott, Gérard Legaré.

Appréciation - Emploi désiré n'apparaît pas dans le formulaire de demande. - Appréciation manifestement erronée. Règlement sur l'immigration: 34(3)(f), - Annexe A.

L'appelant est entré au Canada le 26 avril 1968 et la période de séjour autorisée fut prolongée jusqu'au 20 juin 1968. Le 5 juin 1968, l'appelant fit une demande de résidence permanente mais n'ayant reçu que 30 points d'appréciation sa demande fut refusée. Dans l'espace prévue à cette fin dans le formulaire de demande, l'appelant n'a pas indiqué l'emploi désiré. - Supposément l'appelant est un peintre, mais aucun détail est fourni.

Arrêt: Sans information nécessaire, on ne peut procéder à une appréciation juste et conforme à l'article 1(c), 1(d) et 1(i) de l'annexe A au Règlement. Par suite d'un manque d'information, la conclusion du fonctionnaire à l'immigration est manifestement erronée.-

Appel accueilli.-

Pour l'appelant: M. José Raphaël;
pour l'intimé: M. F.D. Craddock.

I N D E X

| | <u>Number</u> | <u>Page</u> |
|--|---------------|-------------|
| ASSESSMENT | | |
| Conditions precedent | 29 | 193 |
| Method of | | |
| Occupational demand | 2 | 24 |
| BORDER | | |
| Effect of crossing, non-admission to another country | 26 | 190 |
| Effect on "person seeking to come into" | 17 | 158 |
| COUNSEL | | |
| Opportunity to obtain | 19,28 | 181,192 |
| CRIME | | |
| Involving moral turpitude | 1,21,18 | 1,184,171 |
| nature of | 1,21 | 1,184 |
| Scope of as opposed to Code | 18 | 171 |
| DEPENDENT | | |
| Intention to work in future | | |
| effect on status as | 16 | 146 |
| DOMICILE | | |
| Abandonment of | | |
| minor, by | 27 | 191 |
| temporary trip out of Canada | 20,23 | 183,187 |
| Acquisition of, | | |
| time for | 20 | 183 |
| Minister's Permit | | |
| effect of | 20 | 183 |
| EMPLOYMENT | | |
| Arranged | | |
| method of assessment | 2 | 24 |
| Authorization | | |
| nature of | 11 | 119 |
| Border crossing, non-admission to another country | | |
| effect on | 26 | 190 |
| "Except with respect to arranged..."(S.34 I.Reg.) | | |
| nature of | 2 | 24 |
| Nature of | 24 | 188 |

I N D E X

| | <u>Numéro</u> | <u>Page</u> |
|--|---------------|-------------|
| ABROGATION | | |
| définition | 2 | 24 |
| loi sur l'immigration | | |
| loi sur les stupéfiants (abrogée) | 19 | 181 |
| AIDE FINANCIÈRE | | |
| défaut de réception de demande | | |
| motif de réouvrir, comme | 12 | 126 |
| CERTIFICAT MÉDICAL | | |
| motif d'ordonnance, en | 2 | 24 |
| nature de l'article 29 du Règlement | 11 | 119 |
| CHERCHE À ENTRER | | |
| discussion sur | 1 | 1 |
| Canada, au | | |
| application de l'a. 19 ou du rapport à l'a.23 | 1 | 1 |
| critère pour déterminer si une personne | | |
| frontière, qui traversa | 17 | 158 |
| CRIME | | |
| impliquant turpitude morale | 1,21,18 | 1,184,171 |
| nature de | 1,21 | 1,184 |
| portée en relation avec le Code Criminel | 18 | 171 |
| DOMICILE | | |
| abandon du | | |
| mineur, par un | 27 | 191 |
| voyage temporaire hors du Canada | 20,23 | 183,187 |
| acquisition, du | | |
| époque pour | 20 | 183 |
| effet du permis ministériel sur | 20 | 183 |
| EMPLOI | | |
| autorisation | | |
| nature de | 2 | 24 |
| nature de | 24 | 188 |
| réservé | | |
| méthode d'évaluation | 2 | 24 |
| "Sauf en ce qui a trait à un emploi réservé..." | | |
| (a. 34 Règl.) | | |
| nature de | 2 | 24 |
| traverser la frontière et non-admission ailleurs | | |
| effet sur | 26 | 190 |

EVIDENCE

| | | |
|--|------|--------|
| Additional | | |
| admissibility | 4 | 40 |
| "Considered Credible and trustworthy" | | |
| telegram | 5 | 52 |
| telex | 5 | 52 |
| Motion to introduce | | |
| after judgment | 6 | 61 |
| Sufficiency of | | |
| came into Canada by reason of misleading | | |
| information | 25 | 189 |
| Ship's departure | 8,25 | 84,189 |

EXAMINATION

| | | |
|--------------------------------|----|-----|
| Assessment | | |
| Effect of Section 23 Report on | 28 | 192 |

FINANCIAL ASSISTANCE

| | | |
|---------------------------------|----|-----|
| Failure to receive application, | | |
| grounds to re-open, as | 12 | 126 |

FOREIGN LAW

| | | |
|---------------------------------|----|-----|
| Presumption of similarity to, | | |
| Canadian law | 21 | 184 |
| Proof of, | | |
| needed to override Canadian law | 1 | 1 |

FURTHER EXAMINATION

| | | |
|---|----|-----|
| "Person seeking to come into..." after border | | |
| crossing | 17 | 158 |

GROUND

| | | |
|---------------------|-------|---------|
| Mens rea in eluding | | |
| need for | 10 | 112 |
| New, | | |
| added at Inquiry | | |
| validity | 27,28 | 191,192 |
| Severability | 22,11 | 186,119 |
| Withdrawal of, | | |
| whether possible | 19 | 181 |

IMMIGRATION ACT

| | | |
|---------------------------------------|------|-------|
| "Information" and "Deportation Order" | | |
| analogy | 10 | 112 |
| Nature of | 1,10 | 1,112 |
| Non-compliance with | | |
| effect of | 1 | 1 |
| Purpose of | 10 | 112 |
| Repeal | | |
| Part of | | |
| effect | 19 | 181 |

ENQUÊTE

| | | |
|--|------|-------|
| adjoint au directeur | | |
| avis qu'il agit au nom du directeur | 5 | 52 |
| ajournement sans discussion sur le fond | | |
| validité | 18 | 171 |
| droit d' | | |
| personne à charge comprise dans l'ordonnance, d' | 16 | 146 |
| fondement de | | |
| arrestation et détention | 8 | 84 |
| procédure suivie par l'adjoint au directeur | 5 | 52 |
| personne cherchant à entrer au Canada des É.-U. | | |
| effet en vertu de l'a. 24 Loi de l'Imm. | 17 | 158 |
| procédure lors d' | | |
| convocation des témoins | 1,11 | 1,119 |
| fonction | 1 | 1 |
| partialité | 1 | 1 |
| témoin | | |
| convocation du | | |
| discrétion de l'enquêteur spécial | 1,11 | 1,119 |
| présence | 16 | 146 |

ENQUÊTE COMPLÉMENTAIRE

| | | |
|--|----|-----|
| "Personne cherchant à entrer.." après avoir traversé frontière | 17 | 158 |
|--|----|-----|

ÉTAT

| | | |
|----------------------------------|----|-----|
| changement d', | | |
| nature du | 1 | 1 |
| effet du permis du Ministre sur | 20 | 183 |
| perte par | | |
| voyage temporaire hors du Canada | 20 | 183 |
| traverser la frontière | | |
| effet de | | |
| non admission ailleurs, quant à | 26 | 190 |

EXAMEN

| | | |
|------------------------------|----|-----|
| évaluation, voir | | |
| rapport prévu à l'a. 23 sur, | | |
| effet | 28 | 192 |

FRONTIÈRE

| | | |
|--|----|-----|
| effet de traverser frontière et refoulement ailleurs | 26 | 190 |
| effet "sur une personne qui cherche à entrer" | 17 | 158 |

INQUIRY

| | | |
|--|------|-------|
| Adjournment without discussion on merits validity | 18 | 171 |
| Assistant Director judicial notice that he acts for Director | 5 | 52 |
| Easis of, arrest and detention | 8 | 84 |
| procedure followed by Assistant Director | 5 | 52 |
| Conduct bias | 1 | 1 |
| function at summons | 1 | 1 |
| witnesses | 1,11 | 1,119 |
| Nature of | 1 | 1 |
| Person seeking to come into Canada from U.S.A. effect pursuant to s.24 I. Act | 17 | 158 |
| Right to dependent included in order of | 16 | 146 |
| Witness presence of | 16 | 146 |
| summons of S.I.O.'s discretion as to | 1,11 | 1,119 |

INTERPRETATION ACT

| | | |
|--------------------------------------|----|-----|
| Opium and Narcotic Drug Act replaced | 19 | 181 |
|--------------------------------------|----|-----|

JURISDICTION

| | | |
|--|------------|----------------|
| Immigration Appeal Board's Appellate, nature of | 4,19,21,22 | 40,181,184,186 |
| "Go behind" second order to examine first one | 9,3 | 103,37 |
| Re-opening appeal | 12,7 | 126,70 |
| Review Immigration Officer's assessment | 4,12,10,29 | 40,126,112,193 |
| S.I.O.'s discretion | 20 | 183 |
| Special Inquiry Officer's add new ground during Inquiry | 27 | 191 |
| Inquiry, see | | |
| Persona designata, not a | 18 | 171 |
| Review of Imm. Officer's assessment | 2 | 24 |
| Right to hold, inquiry | 21,10 | 184,112 |
| Stay order | 13 | 136 |

LANDING

| | | |
|---|---|----|
| Nature of s. 34 I. Regs. applicability of ss. 28 and 29 I. Act | 2 | 24 |
|---|---|----|

JURIDICTION ET COMPÉTENCE

| | | |
|---|------------|----------------|
| Commission d'appel de l'immigration, de la passer outre deuxième ordonnance et étudier première réouverture | 9,3 | 103, 37 |
| appel | 12,7 | 126,70 |
| révision | | |
| discrétion de l'enquêteur spécial, de la | 20 | 183 |
| évaluation de celle d'un fonctionnaire, de l' | 4,12,10,29 | 40,126,112,193 |
| tribunal d'appel | | |
| nature du | 4,19,21,22 | 40,181,184,186 |
| Enquêteur spécial, de l' | | |
| ajouter nouveau motif lors de l'enquête | 27 | 191 |
| droit de tenir enquête | 21,10 | 184,112 |
| enquête, voir | | |
| persona designata, pas | 18 | 171 |
| reviser l'évaluation d'un fonctionnaire | 2 | 24 |
| surseoir une ordonnance, de | 13 | 136 |

LOI ÉTRANGÈRE

| | | |
|---|----|-----|
| présumée semblable à la loi canadienne | 21 | 184 |
| preuve de nécessité d'outre-passer loi canadienne | 1 | 1 |

LOI SUR L'IMMIGRATION

| | | |
|--|------|-------|
| abrogation, | | |
| partie de, | 19 | 181 |
| effet | 10 | 112 |
| but de | | |
| "Dénonciation" et "ordonnance d'expulsion" | | |
| analogie | 10 | 112 |
| effet de la non-conformité avec | 1 | 1 |
| nature de la | 1,10 | 1,112 |

LOI SUR L'INTERPRÉTATION

| | | |
|-----------------------------------|----|-----|
| loi sur les stupéfiants (abrogée) | 19 | 181 |
|-----------------------------------|----|-----|

MOTIF

| | | |
|--------------------------------|-------|---------|
| dérober (se) implique Mens rea | 10 | 112 |
| nouveau | | |
| ajouté à l'enquête | | |
| validité | 27,28 | 191,192 |
| disjonction | 22,11 | 186,119 |
| retrait de | | |
| condition | 19 | 181 |

| | | |
|---|------|--------|
| MEDICAL CERTIFICATE | | |
| Ground for order, as | 2 | 24 |
| Nature of s. 29 I. Regs. | 11 | 119 |
| NON-IMMIGRANT | | |
| "Ceasing to be a ..." | 1 | 1 |
| "NOTWITHSTANDING SECTION 28(1)" (S.34 I. Regs.) | | |
| meaning of | 2 | 24 |
| REOPENING | | |
| Grounds | | |
| evidence | 12 | 126 |
| notice of hearing | 7 | 70 |
| reception of application for financial aid | | |
| and/or respondent's argument | 12 | 126 |
| Hearing of appeal | | |
| I.A. Board's jurisdiction to order | 12,7 | 126,70 |
| REPEAL | | |
| Defined | 2 | 24 |
| Immigration Act | | |
| Opium and Narcotic Drug Act replaced | 19 | 181 |
| RETROACTIVITY | | |
| Section 34 I. Regulations | | |
| s. 34(3)(e) I. Regulations | 11 | 119 |
| SECTION 23 REPORT | | |
| Scope | 28 | 192 |
| "SEEKING TO COME INTO" (s. 23 I. Act) | | |
| Discussed | 1 | 1 |
| From Canada | | |
| use of s. 19 or 23 report | 1 | 1 |
| Test to determine whether a person is, | | |
| after border crossing | 17 | 158 |
| STATUS | | |
| Border crossing | | |
| effect of | | |
| non-admission to another country | 26 | 190 |
| Change in, | | |
| nature of | 1 | 1 |
| Effect of Minister's Permit on | 20 | 183 |
| Loss of, | | |
| temporary trip outside Canada | 20 | 183 |
| VISA | | |
| Lack of as ground for order | 2 | 24 |

| | | |
|--|-------|---------|
| NON-IMMIGRANT | | |
| "Cesse d'être un..." | 1 | 1 |
| "NONOBTANT L'ARTICLE 28(1)" | | |
| sens de | 2 | 24 |
| PERSONNE À CHARGE | | |
| intention de travailler, | | |
| effet sur l'état d'une | 16 | 146 |
| PREUVE | | |
| additionnelle | | |
| admissibilité | 4 | 40 |
| Départ d'un navire | 8,25 | 84,189 |
| "Estime croyable et digne de foi" | | |
| télégramme | 5 | 52 |
| télex | 5 | 52 |
| Requête en introduction de | | |
| jugement, après | 6 | 61 |
| Suffisance de la, | | |
| "est entré au Canada par suite de renseignements | | |
| faux ou trompeurs" | 25 | 189 |
| PROCUREUR | | |
| possibilité d'obtenir les services d'un | 19,28 | 181,192 |
| RAPPORT PRÉVU À L'ARTICLE 23 | | |
| portée | 28 | 192 |
| RÉCEPTION | | |
| nature de l'article 34 du Règl. de l'Immigration | | |
| application des art. 28 et 29 (Loi sur l'Imm.) | 2 | 24 |
| RÉOUVERTURE | | |
| audition de l'appel, de l' | | |
| compétence de la C.A.I. pour ordonner | 12,7 | 126,70 |
| motifs de, | | |
| avis d'audition | 7 | 70 |
| demande d'aide financière et/ou arguments | | |
| d'intimé | 12 | 126 |
| preuve | 12 | 126 |
| RÉTROACTIVITÉ | | |
| a. 34 Règl. de l'Immigration | | |
| a. 34(3)(e) R. de l'I. | 11 | 119 |
| VISA | | |
| défaut de, | | |
| motif d'une ordonnance, comme | 2 | 24 |

Lacking 1969 II & III

